Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

FRANCINE M. BOXER, MARSHALL FARNELL and SPOKANE COUNTY,
Petitioners,

v.

CLAUDE COX and LINDA COX,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has a state actor "publicly disclosed" a document for purposes of a liberty interest claim under *Board of Regents of State Colleges v. Roth* and *Bishop v. Wood* by filing the document in a public employee's personnel file?

2. Where the Supreme Court and local circuit have expressly declined to address an issue and other circuit courts are sharply split on the issue, is the law in the local circuit "clearly established" for purposes of qualified immunity?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 11

A. The Court Should Grant the Petition to Resolve the Circuit Split on Whether a Document Is "Publicly Disclosed" for Purposes of *Bishop v. Wood* When it Is Placed in an Employee's Personnel File. 11

1. There Is a Sharp Split in the Circuits on Whether Placing a Document in an Employee's Personnel File Constitutes "Public Disclosure." 12

2. The Panel Majority's Holding That a Document Was "Publicly Disclosed" When Placed in an Employee's Personnel File Contradicts with *Bishop* and Severely Hinders the Ability of Public Employers to Manage Their Workforces. 16

B. The Court Should Grant the Petition to Resolve the Inconsistent Approaches of the Circuit Courts Regarding the Relevance of Extra-Circuit Authority to Qualified Immunity's "Clearly Established" Inquiry. 19

1. At the Time Boxer and Farnell Placed a Copy of a Termination Letter in Cox's Personnel File, the Ninth Circuit Was Undecided and Other Circuits Were Split on Whether Such Action Constitutes "Public Disclosure." 20

2. The Majority's Failure to Consider the Split in Extra-Circuit Authority Contradicts This Court's Guidance Regarding the Significance of Circuit Splits to the "Clearly Established" Inquiry. 23

3. The Majority's Failure to Consider the Split in Extra-Circuit Authority Evinces a Much Wider Confusion Over the Significance of Extra-Circuit Authority to the "Clearly Established" Inquiry. 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Bishop v. Wood, 426 U.S. 341 (1976) ..... passim

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 7, 11

Brandt v. Bd. of Coop. Educ. Servs., 820 F.2d 41 (2d Cir. 1987) 14

Burris v. Willis Indep. Sch. Dist., Inc., 713 F.2d 1087 (5th Cir. 1983) 14

Buxton v. City of Plant City, Fla., 871 F.2d 1037 (11th Cir. 1989) 14, 25

Codd v. Velger, 429 U.S. 624 (1977) ..... passim

Copeland v. Phila. Police Dep't, 840 F.2d 1139 (3d Cir. 1988) 13

Doe v. United States Dep't of Justice, 753 F.2d 1092 (D.C. Cir. 1985) 14

Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623 (2d Cir. 1996) 14

Duchesne v. Williams, 849 F.2d 1004 (6th Cir. 1988) 15

El Dia, Inc. v. Rossello, 165 F.3d 106 (1st Cir. 1999) 27

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 19

Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) 27

Johnson v. Martin, 943 F.2d 15 (7th Cir. 1991) 13

Kendall v. Bd. of Educ. of Memphis City Sch., 627 F.2d 1 (6th Cir. 1980) 15

Koerpel v. Heckler, 797 F.2d 858 (10th Cir. 1986) 13

Ledford v. Delancey, 612 F.2d 883 (4th Cir. 1980) 14

Llamas v. Butte Cmty. Coll. Dist., 238 F.3d 1123 (9th Cir. 2001) 9, 21, 22, 28

McGrath v. Gillis, 44 F.3d 567 (7th Cir. 1995) 26

McMath v. City of Gary, Ind., 976 F.2d 1026 (7th Cir. 1992) 17

Merritt v. Reed, 120 F.3d 124 (8th Cir. 1997) 14

Mitchell v. Forsyth, 472 U.S. 511 (1985) 1, 19

Mustafa v. Clark County Sch. Dist., 157 F.3d 1169 (9th Cir. 1998) ..... passim

Olivieri v. Rodriguez, 122 F.3d 406 (7th Cir. 1997) ..... passim

Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71 (1st 1990) 13

Procunier v. Navarette, 434 U.S. 555 (1978) 24

Rakovich v. Wade, 850 F.2d 1180 (7th Cir. 1988) 27

Savidge v. Fincannon, 836 F.2d 898 (5th Cir. 1988) 19

Swint v. Wadley, 514 U.S. 35 (1995) 1

United States v. Lanier, 520 U.S. 259 (1997) 23

Virgili v. Gilbert, 272 F.3d 391 (6th Cir. 2001) 27

Wilson v. Layne, 526 U.S. 603 (1999) 19, 24, 28

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 11, 17

Constitutional Provisions

U.S. CONST. amend. XIV, § 1 2

Statutes

18 U.S.C. § 242 23

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 1

28 U.S.C. § 1331 7

28 U.S.C. § 1343(a)(3) 7

42 U.S.C. § 1983 7

WASH. REV. CODE § 42.17.020(36) 2, 6

WASH. REV. CODE § 42.17.260(1) 2, 6

OPINIONS AND ORDERS BELOW

The memorandum order and opinion of the United States District Court for the Eastern District of Washington denying Petitioners Boxer and Farnell qualified immunity is not reported and is appended hereto. (App. 25.) The panel opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's qualified-immunity ruling, including Judge Hall's dissenting opinion, is reported at 359 F.3d 1105 (2004). (App. 1.)

JURISDICTION

The court of appeals had jurisdiction to review the district court's qualified-immunity ruling pursuant to 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Petitioner Spokane County was a party to the appeal pursuant to the "inextricably intertwined" exception to the final judgment rule discussed in *Swint v. Wadley*, 514 U.S. 35 (1995).

On August 8, 2002, the court of appeals issued an unpublished memorandum opinion affirming the district court's ruling. (App. 84.) On September 13, 2002, Boxer, Farnell and the County filed a petition for panel rehearing or rehearing *en banc*. Seventeen months later, on February 20, 2004, a divided panel denied the petition, but simultaneously withdrew its unpublished opinion. (App. 87.) On the same day, the panel issued a divided new opinion affirming the district court's qualified-immunity ruling and entered judgment. (App. 1.)

Boxer, Farnell and the County timely filed the present petition for writ of *certiorari*. This Court has jurisdiction

under 28 U.S.C. § 1254(1) to review the judgment of the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

Section 42.17.260(1) of the Revised Code of Washington provides in pertinent part: "Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions . . . which exempt[] or prohibit[] disclosure of specific information or records."

Section 42.17.020(36) of the Revised Code of Washington provides in pertinent part: "'Public record' includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."

STATEMENT OF THE CASE

Petitioners Francine Boxer and Marshall Farnell are employees of Petitioner Spokane County (the "County"). At the time of the events at issue in this petition, Boxer was the County Administrator and Farnell was the Director of Administrative Services.

Respondent Claude Cox was the Risk Manager for the County. As Risk Manager, Cox was responsible for processing and investigating claims against the County. Cox was authorized to settle claims for $25,000 or less without approval from the Board of County Commissioners ("Board" or "County Commissioners").

In July 1998, the County Road Department applied a seal coat to Bigelow Gulch Road. The seal did not set properly and hundreds of cars traveling on the road sustained tar and rock damage. The County received approximately 800 property-damage claims from individuals whose cars had sustained damage (the "Bigelow Gulch claims"). Resolving the Bigelow Gulch claims ultimately cost the County over $740,000.

As the County's Risk Manager, Cox was the County official responsible for handling and processing the Bigelow Gulch claims. Cox directed a majority of the claimants to Specialty Auto & Truck Painting, Inc. ("Specialty Auto") for repair and/or cleaning.

Boxer began receiving complaints from the public regarding the processing and payment of the Bigelow Gulch claims. Boxer became concerned that Specialty Auto was significantly overcharging the County for the repair work.

Boxer and one of the County Commissioners met with Cox to discuss the matter. Cox assured them that he had the matter under control.

The County Commissioners had also learned of apparent irregularities in how certain Bigelow Gulch claims were processed and paid. The Board requested the Washington State Auditor's office to investigate. There was considerable press coverage of the investigation. After receiving the Auditor's initial findings, Boxer and Farnell placed Cox on paid administrative leave pending a further review of how the Bigelow Gulch claims had been handled.

The County's Human Resources Department conducted the review, which included interviewing claimants whose cars had sustained damage and undergone repair at the County's expense. The review culminated in a written report dated October 30, 1998 (the "Report"). The Report identified four areas of concern related to the handling of the Bigelow Gulch claims. For example, the Report noted a lack of internal control over, and individual review of, invoices related to the Bigelow Gulch claims. Similarly, the Report determined that Specialty Auto had not provided estimates or invoices to any of the interviewed claimants. The Report's factual findings further suggested that the County had been significantly overcharged for repairs and had been charged for repair work that was not performed.

After reviewing the Report, Boxer and Farnell notified Cox by letter dated November 5, 1998 that they were considering potential disciplinary action, including possible termination. The letter stated that the County's review of the Bigelow Gulch claims had raised serious concerns regarding how the claims had been handled. Accompanying

the letter was a copy of the Report and its supporting documentation. The letter allowed Cox until November 12 to respond, and that date was extended to November 19 at the request of Cox's attorney. On November 19, Cox responded through counsel in a nine-page letter. For the most part, Cox did not dispute the factual findings of the Report — he questioned only the conclusions drawn therefrom.

Thereafter, Boxer and Farnell learned of additional information that also caused them concern. They learned that Cox's wife had purchased an automobile from Specialty Auto, which she paid for by check, and that, on the same day as her purchase, Specialty Auto issued a check back to her in the same amount as she had paid for the car. It concerned Boxer and Farnell that Cox was engaging in personal business with the vendor to which he had assigned a large part of the Bigelow Gulch repair work.

On December 9, 1998, Boxer and Farnell notified Cox by letter regarding their concern. The letter stated that Boxer and Farnell would consider any written response received on or before December 11. On that date, Cox responded through counsel in a two-page letter. Cox explained that the automobile transaction was one in which he had traded hay for a car, exchanging checks only for accounting purposes.

By letter dated December 11, 1998, Boxer and Farnell notified Cox that, after reviewing his written responses to the Report and to their concerns, they had decided to terminate his employment with the County. The termination letter essentially summarized the four areas of concern that had been identified in the Report and also men-

tioned their letter regarding the automobile transaction. Pursuant to a "cc" annotation on the letter, a copy of the termination letter was placed in Cox's personnel file. Neither Boxer nor Farnell publicly disclosed the reasons for Cox's termination.

Thereafter, a local reporter submitted a record request to the County. The reporter made the request pursuant to Washington's Public Disclosure Act, which provides, in pertinent part: "Each agency . . . shall make available for public inspection and copying all public records, unless the record falls within . . . specific exemptions . . . ." WASH. REV. CODE § 42.17.260(1). A "'[p]ublic record' includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." WASH. REV. CODE § 42.17.020(36).

The Office of the Prosecuting Attorney handled the record request. By letter, the Deputy Prosecuting Attorney notified Cox's attorney of the request and indicated that he saw no basis for exempting the termination letter from release under the public record laws. The letter invited Cox's attorney to raise any questions regarding this conclusion and explained that the Deputy Prosecuting Attorney intended to release the letter on December 18, 1998. Neither Cox nor his attorney contested or objected to the release of the termination letter, and the Deputy Prosecuting Attorney released it on December 18. The release of the letter did not result in any press coverage or newspaper articles.

Thereafter, Cox and his wife filed a complaint against Boxer and Farnell, in their individual capacities; the three County Commissioners, in their individual capacities; and Spokane County. The complaint asserted claims under 42 U.S.C. § 1983 alleging *inter alia* that the defendants had deprived Cox of his liberty interest in his "good name and . . . reputation for honesty and integrity," without due process of law. The district court had subject matter jurisdiction over the claim pursuant to 28 U.S.C. § 1331 and 1343(a)(3).

The liberty interest claim was brought under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), and its progeny, which hold that, in certain circumstances, a public employee's termination can implicate the employee's liberty interest in his "good name, reputation, honor, or integrity." *Id.* at 573. To establish such a claim, the discharged public employee must prove (1) a substantially false charge (2) of a stigmatizing nature (3) made in connection with the discharge (4) publicly disclosed (5) by the employer (6) without opportunity for notice and a hearing to refute the charge. *See id.* at 573; *Codd v. Velger*, 429 U.S. 624, 627 (1977); *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

The defendants moved for summary judgment on the liberty interest claim *inter alia*. Finding that facts were disputed, the district court refused to enter summary judgment on the liberty interest claim but found that the only written statement attributable to the defendants upon which the claim could be predicated was the termination letter. (*See* App. 78-83.) Although raised by the defendants, the court did not squarely address *Bishop v. Wood*, 426 U.S. 341 (1976), which held that a public employer does not

deprive an employee of any liberty interest if "there is no *public disclosure* of the reasons for the discharge." *Id.* at 348 (emphasis added).

The defendants moved for reconsideration, again raising *Bishop*. They argued that none of the individual defendants had released the termination letter to the public and that Boxer and Farnell's mere copying the letter to Cox's personnel file did not constitute "public disclosure" under *Bishop*. With regard to each of the County Commissioners, the court granted the motion for reconsideration and granted summary judgment. (*See* App. 60-63.) With regard to Boxer and Farnell, however, the court noted an "evenly divided" circuit split on the issue of whether "placement of a document in a personnel file is sufficient disclosure for a liberty interest claim," and further noted that the Ninth Circuit had not yet resolved the issue. The court sided with those circuits finding public disclosure on such facts and accordingly denied the motion for reconsideration with respect to Boxer and Farnell. (*See* App. 57-60.)

Boxer, Farnell and the County filed a second summary judgment motion, raising *inter alia* qualified immunity for Boxer and Farnell. Notwithstanding the recognized split in the circuits, the court denied the motion, reasoning "that there is no Circuit split on the precise issue before the court," which the court characterized as involving a state public disclosure law and a highly publicized case. (*See* App. 29-41.)

Boxer, Farnell and the County timely appealed the qualified-immunity ruling. In a six-sentence, unpublished memorandum opinion, the panel affirmed the district court's denial. (*See* App. 84-86.) Boxer, Farnell and the

County filed a petition for panel rehearing or rehearing *en banc*. A year and a half later, in an unpublished order, a divided panel denied the petition for rehearing, but simultaneously withdrew its earlier memorandum opinion. (*See* App. 87-88.) The order indicated that a new opinion was forthcoming and, inexplicably, that no petition for rehearing of the forthcoming opinion could be filed. (*See* App. 87-88.)

On the same day that the divided panel denied the petition for rehearing and withdrew its unpublished opinion, the panel — again divided — filed a new, lengthy, published opinion. 359 F.3d 1105 (9th Cir. 2004). The majority affirmed the denial of qualified immunity, holding "that placement of the stigmatizing information in Cox's personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient to trigger Cox's liberty interest under the Fourteenth Amendment." *Id.* at 1112. The majority acknowledged that the Ninth Circuit had not previously resolved the issue before it and that the court had expressly *declined* to resolve the issue on two prior occasions. *Id.* at 1110 (citing *Llamas v. Butte Cmty. Coll. Dist.*, 238 F.3d 1123, 1130 (9th Cir. 2001); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998)). Nevertheless, and without addressing the circuit split on the issue, the majority held that the law on the issue was "clearly established" for qualified immunity purposes. *Id.* at 1113.

In concluding the law was "clearly established," the majority relied primarily on three words of *dictum* from *Mustafa*, one of the two earlier Ninth Circuit opinions *declining* to resolve whether placement of a document in a personnel file constitutes "public disclosure." The panel in

Mustafa had observed that the district court's finding of no public disclosure "*may* be problematical." *Mustafa*, 157 F.3d at 1179 (emphasis added). However, the *Mustafa* panel expressly qualified its *dictum* by emphasizing that the "[o]ther Circuits which have considered this and related issues have disagreed whether dissemination by the defendant is required in all cases." *Id.* at 1179 n.10. Nevertheless, the majority in the present case concluded that the *dictum* "gave officials 'fair warning' that placement of stigmatizing charges in an employee's personnel file may constitute publication for purposes of assessing the asserted deprivation of a liberty interest." 359 F.3d at 1112.

In dissent, Judge Hall criticized the majority for ignoring the circuit split and for concluding that three words of *dictum* could clearly establish the law. As she explained: "A reasonable public official can not be expected to contemplate a significant shift in precedent, such as this Circuit choosing sides on an issue upon which other circuits have manifestly disagreed, and we have explicitly refrained from addressing, based on one line of dictum." *Id.* at 1113 (Hall, J., dissenting).

In light of the divided panel's earlier order precluding the filing of a petition for *en banc* rehearing of its new published opinion, it was necessary that Boxer, Farnell and the County move to recall the mandate in order to seek leave to file a petition for rehearing *en banc*. Petitioners argued that moving for rehearing *en banc* was appropriate in light of the earlier unpublished memorandum opinion's having been withdrawn and replaced by a divided, published opinion making new Ninth Circuit law on a significant constitutional issue on which other circuits were

divided. The panel denied the motion and this petition for *certiorari* followed. (*See* App. 89.)

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant the Petition to Resolve the Circuit Split on Whether a Document Is "Publicly Disclosed" for Purposes of *Bishop v. Wood* When it Is Placed in an Employee's Personnel File.

A public employee's liberty interest in his "good name, reputation, honor, or integrity" may be implicated where, in connection with his termination, his employer makes a charge "that might seriously damage his standing and associations in his community" — for example, a charge "that he had been guilty of dishonesty, or immorality." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972). In *Bishop v. Wood*, 426 U.S. 341 (1976), however, the Court stressed that it would "stretch the concept too far" to suggest that a discharged public employee is deprived of liberty "when there is no *public disclosure* of the reasons for the discharge." *Id.* at 348 (emphasis added). As the Court explained, if the reason for the discharge "was not made public, it cannot properly form the basis for a claim that [the employee's] interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* (footnote omitted; quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

One year after *Bishop* was decided, the Court granted *certiorari* in *Codd v. Velger*, 429 U.S. 624 (1977) (per curiam), on the issue at the heart of the present petition: whether placement of a document in an employee's per-

sonnel file constitutes "public disclosure" under *Bishop*. Ultimately, however, the Court did not reach the issue, because another element of a liberty interest claim — substantial falsity — had neither been alleged nor proved. *Id.* at 626-27.

Since *Codd*, the Court has not revisited the issue and has only rarely addressed the "public disclosure" requirement of a liberty interest claim at all. A sharp split in circuit authority has emerged. With the divided panel opinion in the present case, the Ninth Circuit joined those circuits holding that the mere placement of a document in an employee's personnel file amounts to "public disclosure" under *Bishop*. Apart from further fracturing the circuit courts, the panel majority's holding contradicts *Bishop* and severely hinders a public employer's ability to manage its workforce. The Court should issue a writ of *certiorari* to resolve the split in circuit authority and to reaffirm its holding in *Bishop*.

1. There Is a Sharp Split in the Circuits on Whether Placing a Document in an Employee's Personnel File Constitutes "Public Disclosure."

In the wake of the Court's declining to address the public disclosure issue raised in *Codd*, a clear inter-circuit conflict developed. *See Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997) (Posner, J.) (describing circuit split). Two main approaches for resolving the issue have emerged.

The first approach — followed by the First, Third, and Seventh Circuits — requires *actual* dissemination by the

defendant to the public in order to satisfy *Bishop*'s "public disclosure" requirement. *See Olivieri*, 122 F.3d at 408 (and cases cited therein). These circuits accordingly reject the proposition that placement of a document in a personnel file constitutes "public disclosure." *See Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991) ("[P]otentially stigmatizing information which remains in a discharged employee's personnel file and has not been disseminated beyond the proper chain of command within the police department has not been made public."); *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74-75 (1st 1990) ("[T]he due process requirement that he be afforded a hearing at which he may seek to clear his name is triggered only if the dismissal is based upon false and defamatory charges that are disseminated by the employer .... [T]here is no basis for inferring that the statements contained in his personnel file impaired his freedom to seek alternative employment."); *Copeland v. Phila. Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988) ("To succeed on a claim based on this interest, Copeland must produce evidence that the reason for his termination was made public by the city. Copeland has not done so. He merely alleges that the presence of information relating to his termination in his personnel file raises an inference that the city intends to communicate this information to prospective employers." (citation omitted)); *cf. Koerpel v. Heckler*, 797 F.2d 858, 865 (10th Cir. 1986) ("In most instances, the exact nature of the information disseminated is unknown until publication has occurred ....").

The second approach — followed by the Second, Fourth, and Eleventh Circuits — requires only a *likelihood* or *possibility* of future dissemination to satisfy *Bishop's* "public disclosure" requirement. *See Olivieri*, 122 F.3d at

408 (and cases cited therein). Under this approach, placement of a document in a personnel file constitutes "public disclosure" because the document *may* be disseminated in the future. *See Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 631 (2d Cir. 1996) ("[P]ublic disclosure . . . is 'satisfied where the stigmatizing charges are placed in the discharged employee's personnel file and are *likely* to be disclosed to prospective employers.'" (emphasis added; quoting *Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 45 (2d Cir. 1987))); *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1045 (11th Cir. 1989) ("Because the information in the file *may be* reviewed years after it is filed, its publication, for due process purposes, must be held to occur at the time of filing." (emphasis added)); *Ledford v. Delancey*, 612 F.2d 883, 886 (4th Cir. 1980) ("[P]laintiff . . . ha[s] a protected right with respect to the contents of his personnel file when that file *may be* the subject of inspection by prospective employers." (emphasis added)); *cf. Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1113 n.24 (D.C. Cir. 1985) ("The 'public disclosure' requirement would also be satisfied if the Department placed Doe's termination memorandum in her personnel file and *made that file available*, even on a limited basis, to prospective employers or government officials." (emphasis added)).

In Judge Posner's words, a handful of other circuits "have hedged" on the issue. *Olivieri*, 122 F.3d at 408. For example, in the Fifth and Eighth Circuits, "the mere presence of defamatory information in confidential personnel files does not amount to a violation of one's liberty rights." *Burris v. Willis Indep. Sch. Dist., Inc.*, 713 F.2d 1087, 1092 (5th Cir. 1983); *see also Merritt v. Reed*, 120 F.3d 124, 125, 126 n.3 (8th Cir. 1997) ("plac[ing] the

reason for the dismissal in [employee's] personnel file" did not constitute public disclosure because, "as a matter of policy, discharge reasons are not given to prospective employers"). In the Sixth Circuit, placement of material in a personnel file may suffice if it is "most likely that [the] file would be given to . . . prospective employers." *Kendall v. Bd. of Educ. of Memphis City Sch.*, 627 F.2d 1, 5 (6th Cir. 1980), *overruled on other grounds by Duchesne v. Williams*, 849 F.2d 1004, 1008 (6th Cir. 1988) (en banc). However, where the government agency is, by law, "*required* to make its charges public . . . , it has not voluntarily disseminated the allegedly false information" and "[t]herefore . . . has not deprived [the employee] of her liberty interest." *Id.* (emphasis added).

In short, during the 27 years since the Court in *Codd v. Velger* declined to answer whether placement of a document in a personnel file constitutes "public disclosure" for purposes of *Bishop*, a sharp split in circuit authority has emerged. It is time to resolve this issue. Whether filing a document implicates a public employee's liberty interest under the United States Constitution should not turn on whether the employee resides in a circuit that reads *Bishop* properly — to require actual dissemination — or whether the employee resides in a circuit that holds the mere *possibility* of future dissemination sufficient. The Court should grant the petition in order to finally resolve this important issue of constitutional law.

2. The Panel Majority's Holding That a Document Was "Publicly Disclosed" When Placed in an Employee's Personnel File Contradicts with *Bishop* and Severely Hinders the Ability of Public Employers to Manage Their Workforces.

In a divided opinion that did not even acknowledge a circuit split, the panel majority in the present case joined those circuits holding that mere *likelihood* of future dissemination satisfies *Bishop*: "We now hold explicitly that placement of the stigmatizing information in Cox's personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient to trigger Cox's liberty interest under the Fourteenth Amendment." 359 F.3d at 1112.

This holding is at loggerheads with *Bishop's* "public disclosure" requirement and with sound public policy. *Bishop's* threshold is not that a document is disclos-*able*; its threshold is "public disclosure," pure and simple. *Bishop*, 426 U.S. at 348. Allowing anything short of public disclosure stretches the concept of liberty "too far." *Id.* If it suffices that a document is, in the panel majority's words, subject to disclosure "upon request," then it is *irrelevant* whether such a request is ever made. Under the majority's reasoning, the "public disclosure" requirement is satisfied by *no* disclosure at all.

This is *not* what *Bishop* held, and it cannot be the law. If the reason for an employee's discharge "[i]s not *made public*, it cannot properly form the basis for a claim that [the employee's] interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* (emphasis

added; footnote omitted; quoting *Constantineau*, 400 U.S. at 437). Thus, *regardless* of whether a document in an employee's personnel file is subject to disclosure "upon request," it cannot properly form the basis for a claim that the employee's liberty interest in his good name and reputation has been impaired unless and until the document is "made public." *See McMath v. City of Gary, Ind.*, 976 F.2d 1026, 1035 (7th Cir. 1992) ("Information kept within the department — and, specifically, within [plaintiff's] personnel file — may indeed be a 'ticking time bomb,' but until the time bomb explodes — *i.e.*, until the information is disseminated — there is no publication and no constitutional tort." (citation omitted)).

Drawing the distinction between actual disclosure and the possibility of future disclosure is not splitting hairs — it is of critical import. "[T]here is a qualitative difference, bearing on culpability, between publicizing a stigmatizing ground of dismissal" and simply recording that ground in a personnel file that *might* — someday — be disclosed. *Olivieri*, 122 F.3d at 409. As Judge Posner explained:

> The public employer who goes out of his way to publicize the ground of the dismissal is deliberately taking measures to make it difficult or impossible for the employee to obtain comparable employment, and is thus acting with intent to infringe a constitutionally protected liberty. There is no similar intent in the case in which the employer does not disclose, let alone publicize, the ground of its action. The effect on the employee's future employability is in that case the unavoidable by-product of action taken

> for a wholly different purpose, that of improving the employer's own work force.

Id. The panel majority's position ignores and thereby erases this critical distinction.

Moreover, in allowing the mere *possibility* of future disclosure to satisfy *Bishop*, the panel majority has invited extraordinary consequences for public employers:

> This comes close to arguing that there is no such thing as probationary public employment — that no public employee can be fired without a hearing because if he is, and the ground of the discharge impugns his fitness for employment in a similar job, as it very often will, his employer will have violated his constitutional rights, no matter how secretive the employer is about the ground.

Id.

In short, allowing the majority's position to stand forces public employers to choose among four very unpalatable alternatives: (1) expend inordinate amounts of time, money, and resources providing a hearing for every termination or similar decision; (2) refuse to document such decisions in writing; (3) amend public records laws to prohibit release of public-employment-related materials; or (4) simply resign themselves to allegations of civil rights violations and the possibility of liability. This is a choice public employers should not be forced to make.

To resolve a sharp circuit split on an important constitutional issue, and to correct a holding that contradicts *Bishop* and severely hinders a public employer's ability to manage its workforce, the Court should issue a writ of *certiorari*.

B. The Court Should Grant the Petition to Resolve the Inconsistent Approaches of the Circuit Courts Regarding the Relevance of Extra-Circuit Authority to Qualified Immunity's "Clearly Established" Inquiry.

"[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, if the "legal norms allegedly violated by the defendant" were not "clearly established at the time of the challenged actions," the defendant is entitled to qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

That said, the late Judge Gee's observation regarding qualified immunity, offered more than a decade ago, rings true today: "[T]he meaning of 'clearly established' is not yet clearly established." *Savidge v. Fincannon*, 836 F.2d 898, 910 (5th Cir. 1988) (Gee, J., concurring in part and dissenting in part). The panel majority's opinion in this case — which failed to even *acknowledge* the circuit split — validates Judge Gee's observation and suggests (unfortunately) that the guidance this Court has provided in its qualified immunity opinions is often ignored. The

Court should grant the petition to squarely address the significance a court should attach to a circuit split, particularly where the local circuit lacks any controlling authority of its own.

1. At the Time Boxer and Farnell Placed a Copy of a Termination Letter in Cox's Personnel File, the Ninth Circuit Was Undecided and Other Circuits Were Split on Whether Such Action Constitutes "Public Disclosure."

As noted above, at the time Cox's termination letter was copied to his personnel file, there was a clear split in authority on whether *actual* dissemination was necessary to satisfy *Bishop's* "public disclosure" requirement, or whether the mere *possibility* of future dissemination sufficed. This split in authority was well recognized and had recently been discussed at length by Judge Posner. *See Olivieri*, 122 F.3d at 408.

The Ninth Circuit had not yet entered the fray. In *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169 (9th Cir. 1998), decided just a few months before Cox's termination, the "public disclosure" issue was squarely raised. The court avoided resolving it, however, because the plaintiff in that case had not been terminated and thus could not establish a liberty interest deprivation, regardless of whether material in his personnel file was "publicly disclosed." The court nevertheless emphasized that the issue remained an open one in the Ninth Circuit:

> Mustafa contends that the charges have been publicly disclosed inasmuch as

> the Notice remains in his personnel file, and prospective employers have access to that file when he applies for other teaching positions. . . . However, this Circuit has yet to decide whether, in order for due process protections to be triggered, the charges must be made public by the employer itself, nor has this Circuit decided whether the charges must be made public in an official or intentional manner. Other circuits which have considered this and related issues have disagreed on whether dissemination by the defendant is required in all cases.

Id. at 1179 n.10 (citations omitted).[1] Such was the state of Ninth Circuit law — or, more accurately, the lack of Ninth Circuit law — on this issue at the time Boxer and Farnell copied the termination letter to Cox's personnel file in 1998.

Lest there be any doubt that the law was *not* "clearly established" in 1998, one need only consider *Llamas v. Butte Cmty. Coll. Dist.*, 238 F.3d 1123 (9th Cir. 2001), which the Ninth Circuit decided more than *two years* later:

> We have recently acknowledged that it remains an open question in this Circuit whether, in order to trigger due process

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[1] There was, to be clear, a bit more to *Mustafa* — precisely three words more. As noted above, *Mustafa* mentioned, in *dicta*, that the district court's finding of no public disclosure "*may* be problematical." *Id.* at 1179 (emphasis added).

> protections, the stigmatizing charges must be publicized by the employer.
>
> .... Llamas argues that this acknowledgment demonstrates that we should adopt the rule that maintaining stigmatizing files constitutes publication.... We do not need to address the current circuit split as to whether an employer can satisfy the publication prong by maintaining stigmatizing information in its personnel files.

Id. at 1129-30 (citations omitted). In this light and for that reason, the court in *Llamas* held the defendants were entitled to qualified immunity:

> It is *not well established*, and the unlawfulness would not be apparent to a reasonable ... official, that filing derogatory material ... constituted a violation of [an employee's] constitutional rights.

Id. at 1131 (emphasis added).

In short, it should have been beyond dispute that, at the time of Cox's termination, the law was *not* clearly established that placement of a document in an employee's personnel file constitutes "public disclosure" under *Bishop*. As Judge Hall forcefully explained in her dissent:

> If this court [in *Llamas*] could not identify, in 2001, any "clearly established law" regarding the constitutionality of placing stigmatizing information in an employee's person-

> nel file without affording the employee a name-clearing hearing, then it is incomprehensible to expect a "reasonable public official" to have inferred the unlawfulness of his conduct in December 1998.

359 F.3d at 1114 n.1 (Hall, J., dissenting).

2. The Majority's Failure to Consider the Split in Extra-Circuit Authority Contradicts This Court's Guidance Regarding the Significance of Circuit Splits to the "Clearly Established" Inquiry.

In conducting the "clearly established" inquiry, the panel majority did not even *acknowledge* a circuit split — much less examine its relevance to the "clearly established" inquiry of qualified immunity analysis. The majority's failure in this regard contradicts recent guidance from this Court suggesting that a circuit split, coupled with a lack of controlling authority from the local circuit, precludes a determination that the law is "clearly established."

In *United States v. Lanier*, 520 U.S. 259 (1997), the Court considered the significance of extra-circuit authority to the "clearly established" inquiry's close cousin — the "fair warning" inquiry under 18 U.S.C. § 242. The Court emphasized that conflicting extra-circuit opinions on a particular issue can render the law on that issue "insufficiently certain," thus entitling a state actor to qualified immunity:

> [I]n applying the rule of qualified immunity under 42 U.S.C. § 1983 . . . , we have referred to decisions of the Courts of Appeals when enquiring whether a right was "clearly established." . . . [D]isparate decisions in various Circuits might leave the law insufficiently certain . . . .

520 U.S. at 269.

Two years later, in affirming a grant of qualified immunity in *Wilson v. Layne*, 526 U.S. 603 (1999), the Court again stressed the significance of extra-circuit authority to the "clearly established" inquiry. After noting that there were no "cases of controlling authority" and no "consensus of cases of persuasive authority" at the time of the allegedly unlawful conduct in that case, *id.* at 617, the Court held:

> Given such an undeveloped state of the law, the officers in this case cannot have been "expected to predict the future course of constitutional law." Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

Id. at 617-18 (citations omitted; quoting *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)).

This guidance suggests that, in the absence of controlling Supreme Court or local circuit authority, a circuit split on the legal issue in question precludes a determination that the law is "clearly established" on that issue. At a minimum, such guidance suggests that a court is required to at least *consider* a circuit split in conducting the "clearly established" inquiry.

This Court's guidance notwithstanding, the panel majority in the present case refused to even acknowledge, much less consider, the circuit split on whether placing a document in an employee's personnel file constitutes "public disclosure" under *Bishop*, or whether actual dissemination is required. Instead, the majority considered one — and *only* one — extra-circuit opinion: that of the Eleventh Circuit in *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037 (11th Cir. 1989). As Judge Hall protested in dissent:

> [I]n adopting the rationale of the Eleventh Circuit, the majority apparently glosses over contrary decisions rendered by other circuits. As we cautioned in *Mustafa,* other circuits considering substantially similar issues had reached diametrically different conclusions. The Seventh Circuit, for example, requires the *actual* dissemination of damaging information in order to satisfy the requirement of publication, even if it is highly likely that the information will ultimately be distributed. Similarly, the First Circuit found that the publication prong had not been satisfied where a stigmatizing memorandum had been placed in an em-

> ployee's personnel file, but was not otherwise publicized.

359 F.3d at 1115 n.2 (Hall, J., dissenting) (internal quotation marks and citations omitted).

The majority quite literally turned a blind eye to this contrary authority. In effect, the majority "cho[se] sides on an issue upon which other circuits ha[d] manifestly disagreed," and which the Ninth Circuit itself "ha[d] explicitly refrained from addressing." *Id.* at 1113 (Hall, J., dissenting). The majority then faulted Boxer and Farnell for not anticipating five years earlier which side of the controversy the court would ultimately choose. The majority's holding cannot be squared with this Court's qualified immunity jurisprudence.

3. The Majority's Failure to Consider the Split in Extra-Circuit Authority Evinces a Much Wider Confusion Over the Significance of Extra-Circuit Authority to the "Clearly Established" Inquiry.

The majority's failure to consider the circuit split in this case is indicative of a much wider point of confusion in qualified immunity jurisprudence: the significance, if any, a court should accord extra-circuit authority in conducting the "clearly established" inquiry. On one end of the spectrum are courts like the Seventh Circuit, which will consider *any* authority — binding or persuasive — in conducting the "clearly established" inquiry. *See, e.g.*, *McGrath v. Gillis*, 44 F.3d 567, 570 (7th Cir. 1995) ("This court should 'look to whatever decisional law is available to ascertain whether the law has been clearly established.'"

(quoting *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc))). At the other end is the Eleventh Circuit, which will look *only* to Supreme Court precedent, its own circuit precedent, and decisions of a state's highest court (if the issue is one of state law). *See, e.g., Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (en banc) ("[T]he law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose.").

Other courts fall somewhere along the continuum. For example, the First Circuit declines "to adopt either a hard-and-fast rule that precedent from another circuit is always determinative of whether a law is clearly established or a rule that such precedent is always irrelevant." *El Dia, Inc. v. Rossello*, 165 F.3d 106, 110 n.3 (1st Cir. 1999) (citations omitted). The Sixth Circuit holds that "precedent from other circuits may 'clearly establish' a right," but "only in extraordinary cases." *Virgili v. Gilbert*, 272 F.3d 391, 393 (6th Cir. 2001). Then there is the approach exercised in the present case, which, with due respect to the panel majority, amounts to essentially picking and choosing among extra-circuit authorities.

Clarification is needed, and this case presents an ideal vehicle through which to provide it. First, the case presents a procedurally and legally compelling basis for recognizing qualified immunity. At the time Boxer and Farnell copied the termination letter t Cox's file, circuits were sharply split on whether such action constitutes "public disclosure" under *Bishop*. Both this Court and the Ninth Circuit had previously declined to resolve the issue. *See*

Codd, 429 U.S. at 626; *Mustafa*, 157 F.3d at 1179 n.10. Further, two years after Cox's termination, the Ninth Circuit expressly recognized that the issue *remained* an open question in the Ninth Circuit and granted qualified immunity on that basis. *See Llamas*, 238 F.3d at 1129-30. In short, this case has virtually every factor that could possibly militate in favor of qualified immunity.

More importantly, this case exemplifies why — at least in certain circumstances — extra-circuit authority must be consulted in qualified immunity analysis. Although the Court need not decide the thornier question of whether a *consensus* of extra-circuit authority can "clearly establish" the law, this case forcefully demonstrates why, when the local circuit has not yet spoken, a *split* in extra-circuit authority precludes the law from being "clearly established." Indeed, any holding to the contrary results in the fundamental inequity of faulting lay persons for conduct the unlawfulness of which is the subject of reasonable disagreement among distinguished jurists. *See Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

Finally, the panel majority's approach to the "clearly established" inquiry in this case — selectively picking and choosing from extra-circuit authority — promises to render qualified immunity a nullity. As Judge Hall observed in her dissent:

> We should not equate "clearly established" law with rules which are arrived at through extremely intuitive and analytical parsing of the dicta of two of our own cases, and the

> similar fact pattern of one case from a sister circuit, which stands in direct opposition to the decisions rendered by other circuits. *To do so unfairly collapses the qualified immunity inquiry beyond recognition.*

359 F.3d at 1116 (Hall, J., dissenting) (emphasis added). In this light, Judge Hall found it "unfathomable" that Boxer and Farnell should have been aware that their conduct was unlawful. *Id.* at 1115 (Hall, J., dissenting).

This Court's guidance is needed to clarify what it means to be "clearly established" for purposes of qualified immunity. Petitioners respectfully request a writ of *certiorari*.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of *certiorari*.

RESPECTFULLY SUBMITTED this 20th day of May, 2004.

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App. 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLAUDE COX, husband; LINDA COX, wife,
Plaintiffs-Appellees,

MARSHALL FARNELL; FRANCINE M. BOXER; SPOKANE COUNTY,
Counter-claimants-Appellants,

and

JOHN ROSKELLEY,
Counter-claimant,

v.

JOHN ROSKELLEY, in his individual capacity,
Defendant,

and

FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; SPOKANE COUNTY, a municipal corporation,
Defendants-Appellants.

No. 00-35887
D.C. No.
CV-99-00075-JLQ
OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, Senior Judge, Presiding

Argued and Submitted
July 10, 2002—Seattle, Washington

Filed February 20, 2004

Before: Cynthia Holcomb Hall, A. Wallace Tashima, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Rawlinson;
Dissent by Judge Hall

COUNSEL

Mary P. Gaston, Perkins Coie LLP, Spokane, Washington, for the defendants-appellants.

Paul J. Burns, Spokane, Washington, for the plaintiffs-appellees.

OPINION

RAWLINSON, Circuit Judge:

The sole issue presented in this appeal is whether the district court properly denied qualified immunity to the individual Defendants/Appellants. Because the law was clearly established that publication of stigmatizing information without a name-clearing hearing violates due process, we AFFIRM.

I.

Background

In the summer of 1998, the Spokane County Road Department applied a seal coat to Bigelow Gulch Road. Unfortunately for the County, the mixture did not set as expected, resulting in damage to approximately eight hundred cars hit by flying rock chips and oil.

Appellee Claude Cox, the then-Safety/Loss Manager for Spokane County,[1] oversaw the investigation of the liability claims resulting from the Bigelow Gulch project.

[1]This position is also known as Risk Manager.

Cox reported to Marshall Farnell, the Director of Administrative Services who, in turn reported to Francine Boxer, the County Administrator.

Boxer received numerous complaints from private citizens and a local business regarding Cox's handling, processing, and payment of the Bigelow Gulch claims. Boxer was especially concerned that Specialty Auto & Truck Painting, Inc. was overcharging the County for repair work.

Boxer and County Commissioner Roskelley met with Cox, who assured them that he had the matter under control. Cox assured the County officials that his relationship with Ken Orrino, the owner of Specialty Auto, was "strictly business," and that Specialty Auto was the only company capable of handling the required repairs.[2] After receiving communications from the general public voicing the same overcharging concerns expressed by Boxer, the Board of County Commissioners requested that the Washington State Auditor's Office review the Bigelow Gulch claims.

After the Auditor's office briefed Farnell and Boxer, Farnell and Boxer notified Cox that he was being placed on administrative leave with pay pending further review of issues related to the processing of Bigelow Gulch claims.

Cathy Malzhan, of the County's Human Resources Department, conducted the Bigelow Gulch claims review.

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[2]Actually, auto repairs were funneled to Specialty Auto and to Camp Chevrolet.

Her report identified the following four "areas of concern":

1. Commissioner Roskelley Incident — Trust

This area of concern focused on the aftermath of the earlier meeting among Commissioner Roskelley, Boxer and Cox. The review reflected that, contrary to Cox's representation, there were other providers who could perform the work Cox referred to Specialty Auto.

The review also recounted Commissioner Roskelley's comment to Cox regarding the identity of one specific individual who alerted county officials to the possibility of overcharging by Specialty Auto, and the Commissioner's positive reaction to the individual's having come forward. Despite the Commissioner's express positive reaction, Cox left his meeting with the county officials and proceeded to confront the complaining individual's supervisor by telephone.

The sum import of this matter was described as Cox's betrayal of the trust placed in him by county officials.

2. Lack of Claims Management

This area of concern discussed the complete lack of internal controls over, or individual review of, invoices submitted for payment in conjunction with Bigelow Gulch claims. In addition, claimants were not provided copies of their invoices or estimates, and signed no documents related to the repair work.

3. Alicia Johnson/John Crawford Calls

Alicia Johnson is a Claims Manager for the Washington Counties Risk Pool, an insurance cooperative. She criticized Cox's handling of the Bigelow Gulch claims, including specifically the practice of direct payment to the provider, rather than payment to the provider and claimant jointly. After being informed of Alicia Johnson's comments, Cox called Alicia Johnson's supervisor, John Crawford, and informed John Crawford that Cox "didn't need this kind of trouble."

The review characterized Cox's contact with John Crawford as threatening, because Alicia Johnson reportedly "backed off" after Cox's call.

4. Claude Cox/Ken Orrino Association

This area of concern reflected back to Cox's denial of friendship with Ken Orrino, the owner of Specialty Auto. The review pointed out that Cox had called Orrino his friend when conversing with various individuals, including Boxer.

After receiving the report from Malzhan, Boxer and Farnell wrote Cox a letter entitled "Notice of Potential Disciplinary Action." This notice essentially tracked the areas of concern articulated in Malzhan's report. Approximately one month later Cox was sent another letter entitled "Supplementary Information Regarding Notice of Potential Disciplinary Action." The supplementary letter notified Cox that county officials had been made aware that Cox's wife purchased a car from Orrino. Although Cox's wife wrote a check from a joint checking account to pay for the car, Orrino's wife wrote a check to Cox's

wife in the same amount, on the same date, from Specialty Auto's checking account.

The supplementary notice warned Cox that, left unexplained, these facts "could suggest a potential violation of R.W. 42.23.070[3] and/or lack of judgment." The letter gave Cox two days to respond to the additional facts. Cox's attorney responded on the same day, denying any appearance of impropriety, and explaining the transaction as an exchange of hay for the car. Through his attorney, Cox also challenged all alleged wrongdoing reflected in the earlier letter from Boxer and Farnell.

After reviewing the responses from Cox's attorney, Boxer and Farnell discharged Cox from employment with the County. The termination letter, dated December 11, 1998,[4] essentially mirrored the areas of concern set forth in the Malzhan report and the allegation set forth in the "Supplementary Information" letter sent to Cox.

The termination letter articulated two overall reasons for terminating Cox's employment: 1) failure to meet his responsibilities in conjunction with Cox's processing of claims arising from the Bigelow Gulch incident; and 2) poor managerial judgment on the part of Cox.

As examples of Cox's Bigelow Gulch failures, the termination letter cited examples of overcharging by Spe-

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[3]Wash. Rev. Code § 42.23.070 prohibits any municipal officer from using his position to "secure special privileges".

[4]This date is important because it establishes the timeframe for determining if the law related to Cox's asserted constitutional right was clearly established.

cialty Auto and payment to Specialty Auto for work that was never performed.

The termination letter cited four specific examples of the exercise of poor judgment on Cox's part: 1) calling the supervisor of the individual who alerted county officials to possible overcharging by Specialty Auto; 2) calling the Washington Counties Risk Pool to complain about the claims manager's criticism of the way the Bigelow Gulch claims were handled; 3) suggesting to his staff that they take their vehicles to Specialty Auto for repair when the owner was Cox's friend, and someone to whom Cox had discretion to direct County business; and 4) engaging in personal business with the owner of Specialty Auto.

A copy of the termination letter was placed into, and made a part of, Cox's personnel file. Since Cox was never afforded a pre-termination or post-termination hearing by the County, the termination letter ended Cox's employment with the County.

Subsequent to Cox's termination, a local newspaper filed a public records request for the release of Cox's termination letter. A member of the Spokane County Prosecuting Attorney's Office[5] in a communication entitled an "Opinion and Decision" informed County officials that Wash. Rev. Code § 42.17.310 mandated release of the letter from Cox's personnel file.[6]

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[5]Apparently, the Prosecuting Attorney's Office also serves as the county's legal counsel for civil matters.

[6]We note that the County Attorney's opinion finds support in Washington case law. *See Dawson v. Daly*, 845 P.2d 995, 1000 (Wash. 1993) (stating that a county prosecutor's performance evalua-

Cox and his wife Linda filed a Complaint against Spokane County, the three County Commissioners, Boxer and Farnell. The Complaint asserted causes of action under 42 U.S.C. § 1983 for deprivation of property interest, wrongful discharge and deprivation of liberty interest in Cox's good name.

The defendants filed a motion for summary judgment, without making any qualified immunity argument. The district court granted Defendants' summary judgment motion as to Plaintiffs' property interest claims, but denied Defendants' motion as to Plaintiff's liberty interest claim.[7]

Defendants subsequently filed a motion for reconsideration asserting, among other arguments, that release of the termination letter did not constitute public dissemination. Upon reconsideration, the district court granted the motion in part, entering summary judgment in favor of the individually named county commissioners. The court denied the motion as to Defendants Boxer, Farnell and Spokane County.

The remaining defendants filed a second motion for summary judgment. The second summary judgment motion asserted, for the first time, a qualified immunity defense. Following extensive briefing and oral argument,

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tions are public records because "they contain information relating both to the conduct of government and to the performance of governmental . . . functions").

[7]Any appeal of the district court's adverse ruling on Plaintiffs' property interest claims must await resolution of the merits of Plaintiffs' action. *See* 28 U.S.C. § 1291; *see also Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1191 (9th Cir. 2003).

the district court denied Defendants' second motion for summary judgment, including the qualified immunity argument made on behalf of Boxer and Farnell. We now address whether the district court erred when it denied qualified immunity to Boxer and Farnell.

II.

Discussion

A. Standard of Review

We review *de novo* a denial of summary judgment predicated upon qualified immunity. *See Hufford v. McEaney*, 249 F.3d 1142, 1148 (9th Cir. 2001). Under the two-step qualified immunity inquiry, we accept the facts in the light most favorable to the Plaintiffs. *Mena v. City of Simi Valley*, 332 F.3d 1255, 1261 (9th Cir. 2003). Taken in that light, we must determine if the facts alleged demonstrate that the county officials' conduct violated a constitutional right. *Id.* If violation of a constitutional right is found, we must then determine whether or not the contours of the violated right were clearly established at the time of the violation. *Id.*

B. The County Officials' Conduct Violated Cox's Constitutional Right to a Name-Clearing Hearing

[1] As early as 1972, in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), the United States Supreme Court established that a terminated employee has a constitutionally based liberty interest in clearing his name when stigmatizing information regarding the reasons for the termination is publicly disclosed. Failure to provide a "name-

clearing" hearing in such a circumstance is a violation of the Fourteenth Amendment's due process clause. *See id.*

[2] Publication of the stigmatizing information occurred, if at all, when the termination letter was placed into and maintained in Cox's personnel file. Although we have on two occasions considered this very issue, the differing facts render those cases inapposite.

In *Mustafa v. Clark County School District*, 157 F.3d 1169 (9th Cir. 1998), we expressly declined to resolve the issue of whether placement of the discharge documents in Mustafa's personnel file constituted publication for purposes of Mustafa's liberty interest claim. *Id.* at 1179 n.10. However, the panel did note that "the district court's finding that the charges were not publicized may be problematical." *Id.* at 1179.

In *Llamas v. Butte Community College District*, 238 F.3d 1123, 1129 (9th Cir. 2001),[8] we similarly had no occasion to directly confront the issue we now address. In *Llamas*, we recognized our concern with the district court's finding in *Mustafa* that the "charges were not publicized . . . when details surrounding the charges remained in the employee's personnel file." *Llamas*, 238 F.3d at 1130 (citation and internal quotation marks omitted). The *Llamas* panel specifically distinguished *Mustafa* on the basis that "in *Mustafa*, the employer refused to remove documents relating to the discharge." *Id.* (citation omit-

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[8]We discuss *Llamas* because the dissent and the Defendants rely so heavily upon it to support their arguments and because it is of assistance in analyzing the holding in *Mustafa*. However, in light of our charge to determine clearly established rights *at the time of the violation*, *Llamas* does not control our analysis.

ted). On the other hand, the employer in *Llamas*, "purged Llama's personnel file" of the documents relating to the discharge. *Id.* Understandably, the *Llamas* panel saw no "need to address the current circuit split as to whether an employer can satisfy the publication prong by maintaining stigmatizing information in its personnel files," *id.*, because the stigmatizing information was no longer being maintained in Llama's personnel file.

[3] A critical fact separates this case from *Mustafa* and *Llamas*: in this case, the parties agreed, and argued in their briefs and during oral argument, that once the stigmatizing information was placed into Cox's personnel file, it became a public record under Washington law, mandating disclosure upon request. This factor takes Cox's case beyond the holdings of *Mustafa* and *Llamas*, and into the realm of *Board of Regents v. Roth*. *See* 408 U.S. at 573.

Boxer and Farnell posit that the similarity of the California statute at issue in *Llamas* and the Washington statute at issue in this case compels a ruling similar to that in *Llamas*, i.e. that no publication occurred. However, this argument ignores the fact that the California statute in *Llamas* was never understood to mandate disclosure of documents in an employee's personnel file. The *Llamas* case did not address California's public records law at all. We will never know whether or not the *Llamas* panel would have decided the case differently if presented with evidence that California law mandated disclosure of the information once it was placed in the personnel file.[9] We

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[9]We also note that the specific statute in question in *Llamas* provided that "[i]nformation of a derogatory nature shall not be entered into an employee's personnel records unless and until the employee is

do know that the *Llamas* panel viewed as determinative the fact that Llamas's file was purged and the "current record relating to his termination . . . is not derogatory." 238 F.3d at 1130. Contrary to Boxer and Farnell's argument, the fact that the documents were expunged from Llamas's personnel file made the difference between publication and nonpublication. The *Llamas* panel said as much, declining to "adopt the rule that maintaining stigmatizing files constitutes publication," because in *Mustafa*, "the employer refused to remove documents relating to the discharge[,]" whereas in *Llamas* "defendants purged Llamas's personnel file . . ." *Llamas*, 238 F.3d at 1130 (citation omitted). A comparison of *Llamas* and *Mustafa* reveals that the pivotal distinction between the two cases is that in one (*Mustafa*) the nonpublication finding was "problematical" because the offending documents were not removed and, in the other (*Llamas*), the nonpublication finding was not "problematical" because the offending documents were removed. *See id.*

The facts of this case are more akin to the circumstances presented to the Eleventh Circuit in *Buxton v. City of Plant City*, 871 F.2d 1037 (11th Cir. 1989). In that case, the employee, a police officer, was investigated for an alleged assault that occurred during an arrest. *Id.* at 1038. Similarly to this case, the employee was terminated

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given notice and an opportunity to review and comment on that information." Cal. Educ. Code § 87031(b)(1).

There appears to be no comparable provision in the Washington public disclosure act. Further, the California Public Records Act specifically exempts from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c).

following an investigation, with the Notice of Termination and Internal Affairs Report placed in the employee's personnel file. *Id.* at 1038-39. As with the Washington public records law, Florida law mandated release of the employee's personnel file upon request. *Id.* at 1039 n.2.

The employee filed a § 1983 action, with pendent state law claims. *Id.* at 1039. The district court granted summary judgment in favor of the employer on the basis that the availability of the stigmatizing documents in the personnel file did not constitute publication. *Id.* at 1043.

[4] In reversing the district court's ruling, the Eleventh Circuit court held that "the presence of stigmatizing information placed into the public record by a state entity, pursuant to a state statute or otherwise, constitutes sufficient publication to implicate the liberty interest under the due process clause of the fourteenth amendment to the United States Constitution." *Id.* at 1046. The court expressly ruled that the employee's personnel file became public pursuant to Florida's public records law mandating disclosure. *Id.* at 1045. The court noted that "[b]ecause the information in the file may be reviewed years after it is filed, its publication, for due process purposes, must be held to occur *at the time of filing*." *Id.* (emphasis added).

We are persuaded that the *Buxton* case properly analyzes an employee's liberty interest in remaining free from the public dissemination of stigmatizing information by his employer. *Mustafa* and *Llamas* reflect an analogous train of thought. *Buxton* and this case represent logical extensions of the reasoning articulated in *Mustafa*, as discussed in *Llamas*. In *Mustafa*, we served notice that, under the proper circumstances, placement of stigmatizing information in an employee's personnel file may con-

stitute publication. 157 F.3d at 1179 n.10. In *Llamas*, rather than refuting the message *Mustafa* telegraphed, we distinguished *Mustafa* on the basis that the employer in *Llamas* expunged the offending material from the employee's file prior to any dissemination. *Llamas*, 238 F.3d at 1130. The clear implication of our rulings in *Mustafa* and *Llamas* is that, absent expungement, placement of stigmatizing information in an employee's personnel file constitutes publication when the governing state law classifies an employee's personnel file as a public record.

[5] Adoption of the Eleventh Circuit's rationale, as articulated in *Buxton*, is consistent with our precedent. We now hold explicitly that placement of the stigmatizing information in Cox's personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient to trigger Cox's liberty interest under the Fourteenth Amendment. The lack of an opportunity for a name-clearing hearing violated his due process rights. *See Roth*, 408 U.S. at 573.

C. A Reasonable Public Official Would Have Been Aware That Placing Stigmatizing Information In An Employee's Personnel File When State Law Mandates Disclosure Is Unlawful Absent a Name-Clearing Hearing

We recently ruled that our "analysis used to determine whether a plaintiff alleges a violation of a constitutional right is instructive in determining whether that right was clearly established." *Mena*, 332 F.3d at 1266. We "emphasize[d] that to find that the law was clearly established we need not find a prior case with identical, or even materially similar facts. Our task is to determine whether the preexisting law provided the defendants with fair warning

that their conduct was unlawful." *Id.* (citation, internal quotation marks and alteration omitted).

The termination letter was placed in Cox's file on or about December 11, 1998. *Mustafa*, decided in September, 1998, gave officials "fair warning" that placement of stigmatizing charges in an employee's personnel file may constitute publication for purposes of assessing the asserted deprivation of a liberty interest. 157 F.3d at 1179. We expressly declined to resolve Mustafa's argument "that the charges have been publicly disclosed inasmuch as the Notice [of Intended Disciplinary Action] remains in his personnel file," or the district court's ruling that the "charges were never officially or otherwise intentionally made public by anyone connected with the school district." *Id.* at n.10 (internal quotation marks omitted). However, we served notice that the district court's finding of no publication was "problematical." *Id.* at 1179. We avoided ruling on the publication issue only because Mustafa was transferred, rather than terminated, resulting in no constitutionally prohibited conduct. *See id.*

[6] In *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982), we cited *Roth* and held that an employee's liberty interest is implicated if a charge of improper conduct impairs the employee's reputation for honesty or morality. "The procedural protections of due process apply if the accuracy of the charge is contested, *there is some public disclosure of the charge*, and it is made in connection with the termination of employment . . . ." *Id.* at 777-78 (emphasis added). We quoted and discussed *Vanelli* again in *Jones v. Los Angeles Community College District*, 702 F.2d 203, 206-07 (9th Cir. 1983). As noted above, Washington law provides that a personnel document is a public record, subject to disclosure, if it

relates to the conduct of government and to the performance of governmental functions. Wash. Rev. Code § 42.17.310; *Dawson v. Daly*, 845 P.2d 995, 1000 (Wash. 1993). And there is no doubt that the termination letter charged improper conduct and could impair Cox's reputation for honesty or morality. Accordingly, Defendants knew or should have known that there would be "some public disclosure" of the charges contained in the termination letter of a public employee embroiled in a dispute of public interest. By 1998, it was clearly established that such public disclosure meant that the procedural protections of due process applied.

In combination, *Roth*, *Vanelli*, *Mustafa*, *Buxton*, and the operation of Washington's public disclosure law preclude a viable "head-in-the-sand" defense on the part of County officials. We reiterate that, even in the absence of a Ninth Circuit case directly on point, government officials may still be fairly warned of potential constitutional deprivations. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060-61 (9th Cir. 2003). Here, however, there is much more than *Buxton*; because of the public disclosure provisions of state law, our own cases such as *Vanelli* plainly informed Defendants of their obligations.

III.

Conclusion

[7] Accepting as true Cox's assertion that the Notice of Termination in his personnel file contained stigmatizing information and, in light of Washington law mandating disclosure of all materials contained in an employee's personnel file, we hold that placement of the Notice of Termination in Cox's personnel file without a name-

clearing hearing violated Cox's due process rights under the Fourteenth Amendment. We further hold that the contours of the right to a name-clearing hearing upon placement of stigmatizing material in a personnel file were clearly established, such that a reasonable official in these defendants' position would have known that his conduct was unlawful. Accordingly, we AFFIRM the district court's denial of qualified immunity to Boxer and Farnell.

HALL, Circuit Judge, dissenting:

The defense of qualified immunity must fail when, accepting the facts in the light most favorable to the plaintiff, a reasonable public official would have been aware that his conduct violated clearly established constitutional norms. *Mena v. City of Simi Valley*, 332 F.3d 1255, 1261 (9th Cir. 2003). However, although "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), courts presented with qualified immunity claims have a responsibility to "determine whether the law was clearly established at the time of the alleged constitutional violation." *Mena*, 332 F.3d at 1261.

Whether or not the majority's disposition with regard to the issue of characterizing "placement of stigmatizing information in an employee's personnel file . . . when the governing state law classifies an employee's personnel file as a public record" is sensible, its decision to charge a reasonable public official with notice of its inclination to so decide is disquieting. A reasonable public official can not be expected to contemplate a significant shift in precedent, such as this Circuit choosing sides on an issue upon which other circuits have manifestly disagreed, and we have explicitly refrained from addressing, based on one line of dictum.

Given the context in which this appeal is presented, I am firmly convinced that the district court's denial of qualified immunity to the individual Defendants-Appellants was incorrect. I respectfully dissent.

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As the majority appropriately recognizes, the decision of whether to credit a qualified immunity defense is a two step inquiry. First, we determine whether the conduct of the government official violated a constitutional right of the plaintiff. Second, if a violation has occurred, we decide whether the contours of that right were clearly established at the time of the purported violation. *Mena*, 332 F.3d at 1261.

The majority's determination that the first element of the qualified immunity examination has been satisfied, while not compelled by our precedent, is reasonable. Although we have previously declined to "address the current circuit split as to whether an employer can satisfy the publication prong by maintaining stigmatizing information in its personnel files," *Llamas v. Butte Community Coll. Dist.*, 238 F.3d 1123, 1130 (9th Cir. 2001), the majority's decision to analogize the facts of this case to those confronted by the Eleventh Circuit in *Buxton v. City of Plant City*, 871 F.2d 1037 (11th Cir. 1989) is not objectionable. Had we confronted precisely that issue in another context, I might very well be persuaded, along with my learned colleagues, that the *Buxton* case "properly analyzes an employee's liberty interest in remaining free from the public dissemination of stigmatizing information by his employer." In the context of a qualified immunity defense, however, whether we believe that a particular rule *should* be adopted is irrelevant. The "relevant, dispositive inquiry" is whether a particular right was *clearly established* at the time of an alleged violation of that right, inasmuch as "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Mena*, 332 F.3d at 1261.

The language of our holdings in both *Llamas* and *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169 (9th Cir. 1998) make astonishingly clear how inequitable it is to charge Defendants-Appellants with being on notice of the unconstitutionality of their actions. In *Llamas*, we "acknowledged that it remains an open question in this Circuit whether, in order to trigger due process protections, the stigmatizing charges must be publicized by the employer," or rather "retention of stigmatizing information in [the employee's] personnel file can constitute 'disclosure.'" *Llamas*, 238 F.3d at 1129-30. Given our Circuit's lack of a definitive statement regarding that "open question," we averred that "[i]t is not well established, and the unlawfulness would not be apparent to a reasonable . . . official, that filing derogatory material and/or expunging Llamas's employment file constituted a violation of his constitutional rights. There is no 'clearly established' right implicated . . . ." *Id.* at 1231. Although the publication at issue in *Llamas* was not precisely equivalent to the derogatory information involved in the instant case, since in *Llamas* the allegedly stigmatizing material had been purged from the plaintiff's file, our admonition was rather apparent. We could not identify in any previously decided cases,[1] nor would we then promulgate any "clearly estab-

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[1] The majority deigns to consider the reasoning articulated in *Llamas* in spite of the fact that it was not decided until after the purported constitutional violation at issue here occurred. However, while *Llamas* does not "control [the] analysis," as the majority rightfully recognizes, its import should be starkly clear. If this court could not identify, in 2001, any "clearly established law" regarding the constitutionality of placing stigmatizing information in an employee's personnel file without affording the employee a name-clearing hearing, then it is incomprehensible to expect a "reasonable public official" to

lished" law regarding the propriety of placing stigmatizing information in an employee's personnel file without affording that employee "timely notice and a meaningful opportunity to be heard." *Id.*

Moreover, our language in *Mustafa*, the very language upon which the majority relies for its conclusion that public officials had " 'fair warning' that placement of stigmatizing charges in an employee's personnel file may constitute publication," does not support the majority's position. Although we opined in *Mustafa* that the district court's conclusion that the mere placement of stigmatizing information in a personnel file did not constitute publication "*may* [have been] problematical," we cautioned that "this Circuit has yet to decide whether, in order for due process protections to be triggered, the charges must be made public by the employer itself, nor has this Circuit decided whether the charges must be made public in an official or intentional manner." *Mustafa*, 157 F.3d at 1179 & n.10 (emphasis added). We pointed out that "[o]ther circuits which have considered this and related issues have disagreed on whether dissemination by the defendant is required in all cases." *Id.* at 1179 n.10.[2] However, we chose

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have inferred the unlawfulness of his conduct in December 1998. *See McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 278 (2d Cir. 1999) ("The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct. The unlawfulness must be apparent.").

[2] majority concludes that *Buxton* was not merely fair warning of the potential unconstitutionality of placing stigmatizing information in an employee's personnel file, but was in fact a "clarion call to government officials." Alas, in adopting the rationale of the Eleventh Circuit, the majority apparently glosses over contrary decisions ren-

not to confront the issue directly since the plaintiff in *Mustafa* had been transferred rather than terminated. Nonetheless, our language made it all too clear that the issue presented by this case had yet to be resolved. Nor have we definitively resolved the issue since our decisions in *Mustafa* and *Llamas*.

A reasonable public official is charged with notice of "sufficiently developed" law even though the situation the official confronts is neither "identical" nor even "materially similar" to the facts of the seminal cases of that area of law. *Mena*, 332 F.3d at 1266-67. However, the "clearly established" prong of the qualified immunity inquiry should not be written out of existence entirely. At some level, there must be a distinction between cases which give public officials "fair warning" of the potential wrongfulness of their conduct, and those which merely hint at a possible shift in position at some unspecified fu-

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dered by other circuits. As we cautioned in *Mustafa*, other circuits considering substantially similar issues had reached diametrically different conclusions. The Seventh Circuit, for example, requires the *actual* dissemination of damaging information in order to satisfy the requirement of publication, even if it is highly likely that the information will ultimately be distributed. *Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991) ("[T]he mere existence of damaging information in Johnson's personnel file cannot give rise to a due process challenge."). *See also Ratliff v. Milwaukee*, 795 F.2d 612, 617 (7th Cir. 1986) ("Absent proof that . . . defendants *disseminated* the stigmatizing information . . . [plaintiff] can not show that the defendants' actions impinged on her liberty interest . . . .") (emphasis added). Similarly, the First Circuit found that the publication prong had not been satisfied where a stigmatizing memorandum had been placed in an employee's personnel file, but "was not otherwise publicized." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990).

ture date. Unfortunately, the majority has chosen to essentially eviscerate any such distinction. It is unfathomable that a reasonable public official should be aware of the unlawfulness of his conduct based on a three-word aside, which was expressly qualified by an accompanying footnote, cautioning that a lower court's decision concluding to the contrary "may be problematical." We should not equate "clearly established" law with rules which are arrived at through extremely intuitive and analytical parsing of the dicta of two of our own cases, and the similar fact pattern of one case from a sister circuit, which stands in direct opposition to the decisions rendered by other circuits. To do so unfairly collapses the qualified immunity inquiry beyond recognition.

For the foregoing reasons, I would reverse the district court, and grant qualified immunity to the Defendants-Appellants.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

CLAUDE COX AND LINDA COX, husband and wife, Plaintiffs, vs. FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; and SPOKANE COUNTY, a municipal corporation, Defendants.	NO. CS-99-0075-JLQ MEMORANDUM ORDER AND OPINION DENYING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Before the court is Defendants' second Motion for Summary Judgment (Ct. Rec. 58). The court held a hearing on this motion on September 7, 2000. Plaintiffs were represented by Paul Burns. Defendants were represented by Thomas Kingen.

I. Background

The full facts of this case have been described in detail in this court's earlier orders regarding Defendants' first motion for summary judgment and Defendants' motion for reconsideration (Ct. Recs. 44 and 57). It is sufficient, for the purposes of the present motion, to restate only a few pertinent facts.

This case arose out of Plaintiff Claude Cox's ("Mr. Cox's") December 11, 1998, termination from his position as Risk Manager for Spokane County. The termination letter, which was signed by Defendant Spokane County employees Francine M. Boxer and Marshall Farnell, indicated that they had decided to terminate Mr. Cox for his role in processing claims for auto-body repairs related to a road-paving project performed by Defendant Spokane County that resulted in damage to many private vehicles.

Plaintiffs' complaint set forth two theories of recovery, both of which were based on notions of procedural due process. First, Plaintiffs claimed that Mr. Cox had a property interest in his job and that therefore the method of his termination violated his due process rights. Second, Plaintiffs claimed that the method of his termination was improper because the charges made in connection with his termination implicated his liberty interest in future employment.

Defendants filed their first motion for summary judgment in December 1999. On April 19, 2000, this court issued its order on that motion, holding that Mr. Cox did not have a property interest in his job but that he had raised an issue of fact regarding whether Defendants had violated his right to due process with regard to the liberty interest. Defendants asked this court to reconsider that ruling. On June 15, 2000, this court affirmed its conclusion that Plaintiffs had stated an issue of material fact regarding whether Defendants had violated his right to due process with regard to Mr. Cox's liberty interest, but held that his claim survived against only Ms. Boxer, Mr. Farnell, and Spokane County.

Defendants have now filed a second motion for summary judgment. They claim 1) that Plaintiffs have not stated a genuine issue of material fact as to the falsity of the statements in the December 11, 1998, termination letter, 2) that Defendants provided Mr. Cox all of the process to which he was entitled, and 3) that Defendants are immune from liability for these claims.

II. Standard of Review

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the material facts before the court. *See Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S. Ct. 469, 46 L.Ed.2d 399 (1975). The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in favor of the non-moving party, there are no genuine issues of material fact in dispute. *See* Fed.R.Civ.P. 56(c).

III. Genuine Issue of Falsity

Defendants' motion attempts to revisit the issue of whether Plaintiffs have stated a genuine issue of material fact as to whether any of the statements in the termination letter were false. Defendants are correct that, to survive summary judgment, Plaintiffs must put into issue the truth or falsity of the statements which he claims implicated his liberty interest. *See Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977).

This court has already considered the falsity issue twice and concluded both times that Plaintiffs have raised a genuine issue of material fact as to the truth or falsity of the allegations in the termination letter. Although Defen-

dants claim they are not rehashing previously decided issues, the issue of falsity has been a continual concern in both the parties' briefing and the court's consideration of Defendants' previous motions. Defendants raised the issue in their briefing of their first motion for summary judgment (Ct. Rec. 34, p. 9) and in their briefing of the motion for reconsideration (Ct. Rec. 55, pp. 2-3). This court's orders on both those motions also expressly ruled on the issue. On April 19, 2000, this court held:

> As to the truth or falsity of the statements, Cox has repeatedly denied the allegations made in the newspaper and in his termination letter, both at the time of [the] newspaper articles and in declarations before this court. *Cox has stated a genuine issue of material fact as to the truth or falsity of the allegations Defendants made in their termination letter.* (Ct. Rec. 44, p. 12) (emphasis added).

On June 15, 2000, this court reconsidered the issue and held:

> At the hearing on the motion for reconsideration, there was considerable discussion regarding whether Cox had raised a genuine issue of material fact as to whether the charges made in the termination letter are false. Cox must show that the charges were both stigmatizing *and* false in order to recover. [*Citing Codd, supra*] However, Cox's affidavit makes it clear that he denies all of the charges made in connection with his termination. . . . *This is sufficient to raise a genuine issue of material fact about the truth or falsity of the statements.* (Ct. Rec. 57, p. 11) (emphasis added).

The court has already considered and denied Defendants' argument twice, and sees no reason to reverse itself. In addition, in response to the second motion for summary judgment, Plaintiffs have submitted an additional affidavit from Mr. Cox in which he further denies, with greater specificity, all of the charges made in the termination letter. Although Defendants disagree with this court's previous resolution of the issue, the court will follow its earlier rulings.

IV. Qualified Immunity

Defendants also argue that Ms. Boxer and Mr. Farnell are qualifiedly immune from suit for their signing of the allegedly defamatory letter terminating Mr. Cox. These Defendants argue that it was not clearly established in December 1998 that a liberty-interest, due-process claim could arise from placing an allegedly false and stigmatizing document in a public employee's personnel file. This court has already held that a claim can arise from the placement of such a document in an employee's personnel file, as set forth in this court's June 15, 2000, Order. The question Defendants now present is whether the individual Defendants are immune from suit based on the law as it stood in December 1998. At oral argument on the Defendants' current motion for summary judgment, the court stated that its initial impression was that Defendants Boxer and Farnell were entitled to qualified immunity. However, upon reviewing the issue further in light of that argument and researching Washington State law, which at the time in question made it clear that the allegedly defamatory letter would be made available to the public and the press, the court has determined that Defendants Boxer and Farnell are not entitled to qualified immunity from this suit.

Public officials are entitled to qualified immunity for performing discretionary functions of their jobs "insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Wilson v. Layne*, 526 U.S. 603, 609 (1999). In determining whether an official enjoys qualified immunity this court must ask "1) was the law governing the official's conduct clearly established? 2) under that law, could a reasonable official have believed the conduct was lawful?" *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). As to the first prong of this inquiry, "'[c]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson*, *supra*, 526 U.S. at 614-15, *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

It is beyond question in this case that it was clearly established in December 1998 that public entities could not make false, defamatory, and public statements in connection with an employee's termination without providing the employee due process. Plaintiffs contend that this is a sufficiently narrow statement of the applicable legal rule and that therefore they have cleared the first hurdle of the qualified immunity analysis. Defendants counter that this court's inquiry into whether the law was clearly established in December 1998 must focus on a narrower question, namely whether it was clearly established that the placement of a termination letter in a public personnel file, without more, was sufficient public disclosure that would trigger the requirements of due process.

In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the Court made it clear that qualified immunity requires

> that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

The Ninth Circuit also recently made it clear just how precise the contours of the right must be for the purposes of qualified immunity analysis. In *Devereaux v. Perez*, 218 F.3d 1045 (9th Cir. 2000), the plaintiff had been investigated and indicted for alleged child abuse, only to have the charges dropped for lack of evidence. He sued in federal court, claiming that state officials had violated his due process rights by coercing witnesses into testifying against him. The court held that he had failed to show that there was a clearly established right that had allegedly been violated, and stated that the right which plaintiffs had to show was clearly established was the "right to have child witnesses, in a child abuse investigation, interviewed in a particular manner or pursuant to a particular protocol." *Id.* at 1053.

Devereaux thus indicates that in determining whether the applicable legal rule was clearly established, a court must focus on whether it was clearly established that the precise behavior at issue could violate constitutional rights. Given that precedent, this court agrees with Defendants that Plaintiffs bear the burden of showing that it was clearly established in December 1998 that Mr. Cox's liberty-interest, due-process rights could be violated by placing his termination letter in his personnel file, without

more. Defendants claim that it was *not* clearly established in December 1998 that they could violate Mr. Cox's rights by doing so.

Defendants rely on what, at first blush, appears to be a split in the Circuits on this issue. As this court noted in its June 15, 2000, Order, the Ninth Circuit has not yet ruled on the issue. *See Mustafa* v. *Clark County School District*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998). The Circuits which have decided the issue are to a certain degree evenly split, 3-3, with the Second, Fourth, and Eleventh Circuits holding that the placement of a document in a public employee's personnel file is sufficient to give rise to a due-process claim, and the First, Third, and Seventh Circuits holding that it is not, at least on the facts they considered in the cases before them. *Compare Donato v. Plainview School District*, 96 F.3d 623, 631-32 (2d Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); and *Buxton v. City of Plant City, Florida*, 871 F.2d 1037, 1044-45 (11th Cir. 1989) with *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990); *Copeland v. Philadelphia Police Dep't.*, 840 F.2d 1139, 1148 (3d Cir. 1988); and *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998). The Supreme Court has not ruled on the issue, although in *Codd v. Velger*, *supra*, the Court apparently assumed that the placement of a document in a public employee's personnel file constitutes public disclosure for the purposes of a procedural due process claim. *See* 429 U.S. at 625-27.

None of these cases, however, deal with the question of whether, under Washington law and in the particular circumstances of this case, it was clearly established that the placement of an allegedly defamatory letter in

Mr. Cox's personnel file could constitute publication for the purposes of a liberty-interest, due-process claim. As Plaintiffs point out, it was clear in December 1998 that once the termination letter was placed in Mr. Cox's personnel file, Washington State law required Spokane County to disclose the document in response to any request from the press or the public.

All government entities within the State of Washington are subject to the requirements of the Public Disclosure Act, RCW §§ 42.17.010-42.17.962 (the "PDA"). The PDA, which was adopted by voter initiative in 1972, denominates virtually any document generated by a public agency as a "public record" and requires disclosure of all public records unless one of the PDA's narrow exceptions applies. RCW §§ 42.17.020(36), 42.17.251, 42.17.260(1). Of those exceptions, only one arguably covers Mr. Cox's termination letter, the exception for "personal information . . . to the extent that disclosure would violate [an employee or official's] right to privacy." RCW § 42.17.310(1)(b). While this exception applies to some information in personnel files, a document is subject to the exception only if disclosure would be 1) highly offensive to a reasonable person, **and** 2) of no legitimate concern to the public. *See Dawson v. Daly*, 120 Wash.2d 782, 794-95 845 P.2d 995 (1993); RCW § 42.17.255.

In 1993, in *Dawson*, the Washington State Supreme Court held that routine performance evaluations of prosecutors are both highly offensive and not of any legitimate public interest. *See* 120 Wash.2d at 795-99. However, the court rested its decision on the fact that the evaluations in that case were routine and did not "discuss specific instances of misconduct or public job performance." *Id.* at 800. *Dawson* does not reach documents such as

Mr. Cox's termination letter, which contains specific allegations of mismanagement of substantial public funds. The Washington Court of Appeals explicitly held, after *Dawson* and prior to December 1998, that "there exists a reasonable concern by the public that government conduct itself fairly and use public funds responsibly." *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash.App. 319, 328, 890 P.2d 544 (1995) (finding a legitimate public interest in fire chief's retirement agreement). *See also Tacoma Public Library v. Woessner*, 90 Wash.App. 205, 223, 951 P.2d 357 (Feb. 1998), *as amended on remand on other grounds*, 972 P.2d 932 (1999). Mr. Cox's termination letter was indisputably subject to disclosure because it contained specific charges both that he had acted unfairly while in his public office and that he had not used public funds responsibly. The public concern in the termination letter was legitimate and the privacy exception to Washington's disclosure laws was clearly inapplicable.

It was also highly likely that a member of the press or the public would request a copy of Mr. Cox's termination letter. As this court has repeatedly noted in its orders in this case, the Cox pre-termination suspension had received extensive coverage in the local press. From his suspension in September 1998 to his termination on December 11, 1998, the entire incident was front-page, top-story news in the *Spokesman Review*, Spokane's daily newspaper. It was all but a foregone conclusion that when Mr. Cox was terminated on December 11, 1998, either the press or a member of the public would request a copy of the letter under the PDA.

Spokane County received a request for the termination letter on December 14, 1998. Spokane County's response to that request shows that Spokane County was well

aware in December 1998 that the PDA required disclosure of the termination letter in light of the 1993 case of *Dawson v. Daly*, *supra*. On December 16, 1998, prosecutor James Emacio wrote to Mr. Cox's counsel to inform him that he had received the disclosure request and that Mr. Emacio planned to disclose a copy. Mr. Emacio wrote, "I am unaware of any provisions [in the PDA] which would preclude my release of the [termination letter] to [the local press]. It appears to me that the holding of *Dawson v. Daly* . . . is dispositive of this matter." (Ct. Rec. 30, Ex. B.)

It was thus not subject to debate in December 1998 that 1) a stigmatizing statement in connection with an employee termination would give rise to a liberty interest and a due-process requirement if that statement was made public, 2) Washington law mandated that the termination letter be disclosed upon request, and 3) the local press coverage of the entire incident made it extremely likely that the press or the public would request a copy of the termination letter. Defendants argue that nonetheless they cannot be held liable because the Circuits are split on whether the placement of a document in a personnel file, without more, is sufficient to give rise to a liberty interest claim.

A close look at the Circuit opinions which address whether a liberty-interest claim can arise from the placement of a document in a personnel file reveals that there is no Circuit split on the precise issue before the court, that issue being whether a liberty interest can arise from the piacement of a document in a personnel file when a) that document was clearly subject to public disclosure under state law and b) it was extremely likely that the press or the public would make such a request. Of the

three Circuits that have dismissed liberty-interest claims in which the only alleged public disclosure was the placement of the document in the employee's personnel file, none of them have addressed a state statute such as Washington's PDA, and none of them concerned a highly publicized case such as Mr. Cox's.

For example, while the Seventh Circuit has stated that it requires actual disclosure of a document, none of its several cases address circumstances similar to that here. *See Ratliff v. City of Milwaukee*, 795 F.2d 612 626-27 (7th Cir. 1986) (discipiine had not been made a matter of public concern; public disclosure statute not addressed); *Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991) (no publicity of discipline; no state statute similar to the PDA discussed); *Clark v. Maurer*, 824 F.2d 565, 567 (7th Cir. 1987) (fact of termination was made public but employee's name was not; no state disclosure statute at issue); *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998) (grounds for discipline not publicized; no state statute considered). The same holds true for the cases out of the First and Third Circuits, which have ruled much less frequently on the issue. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990) (there was no publicity of the discipline; no state statute was considered); *Copeland v. Philadelphia Police Dep't.*, 840 F.2d 1139, 1148 (3d Cir. 1988) (no publicity of the discipline; no state statute addressed.)

In contrast, all of the Circuit opinions which have considered the effect of a state statute which mandates public disclosure of a particular public record have held that if the record is stigmatizing and false, its mere creation is sufficient public disclosure for the purposes of a liberty-

interest claim. In *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989), public officials had placed an allegedly false stigmatizing letter in the plaintiff-employee's personnel file. Under Florida law, the letter was a public record and its disclosure was required upon request. *See id.* at 1044-45. In fact, a refusal to provide the letter to a member of the public upon request could have resulted in criminal sanctions. *See id.* at 1044. The Eleventh Circuit held that in light of this statute requiring disclosure of the letter, placing the document in the file was sufficient public disclosure for the purposes of the plaintiff's liberty-interest claim. *See id.* at 1045-46.

The Second Circuit, in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), reached a similar conclusion. In that case, the plaintiff's name had been placed on a register of child abusers. Although the government did not take the initiative in distributing the list of abusers to the public, New York law required certain employers to consult the list before hiring an individual. *See id.* at 995-96. The fact that the stigmatizing information had to be disclosed under state statute was enough to make the inclusion of the plaintiff's name in the register, without more, sufficient public disclosure for the purposes of a liberty-interest claim. *See id.* at 1000.

These are the only two Circuit cases which this court has found that address whether the presence of a state statute mandating disclosure of a particular document or record can make the creation of that document or record sufficiently public for the purposes of a liberty-interest claim. There are no appellate decisions to the contrary, and thus no Circuit split on the issue which would result in qualified immunity. Although the Ninth Circuit has yet to rule on the issue, "[a] right can be clearly established

even though there [is] no binding precedent in [the] circuit." *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989), *cert. denied*, 493 U.S. 1097 (1990), *citing Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988).

This court holds that, in these circumstances, the law was clearly established that the placement of Mr. Cox's termination letter in his personnel file could give rise to a liberty-interest, due-process claim. In December 1998, it was beyond dispute that governments and government officials must provide sufficient due process to a terminated employee if the reasons for the termination were stigmatizing and false, and had been made public. It had also been settled in Washington State for 5 years, if not longer, that the PDA required Spokane County to disclose Mr. Cox's termination letter, which was of considerable, legitimate public interest. Furthermore, all of the Circuits which had addressed a statute similar to the PDA had held that the placement of a stigmatizing and false document in a file subject to such a statute was sufficient public disclosure for the purposes of a liberty-interest, due-process claim.

This does not end the court's analysis, however. As noted earlier, the court must also analyze whether, in light of the clearly established law, a reasonable officer could have believed his conduct was lawful. *See Act Up!*, *supra*, 988 F.2d at 871. "[I]t is the defendants' burden to show that 'a reasonable officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right.'" *Munger v. City of Glasgow Police Dep't.*, ___ F.3d ___, 2000 WL 1252086, *4 (9th Cir.), *quoting Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1997). "Where 'conflicting inferences may be drawn from

the facts [concerning the 'reasonable conduct' issue], the case must go to the jury.'" *Munger, supra,* at *4, *quoting LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000).

This court holds that, in light of this clearly established law, it was not reasonable for Mrs. Boxer and Mr. Farnell to believe that they would not implicate Mr. Cox's liberty interests if they placed this letter in his termination file. The requirement that a reasonable official would have known their actions may have violated clearly established law is to allow the officials to "reasonably anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). There was ample reason in this case for a reasonable public official to be aware that the placement of the December 11, 1998, termination letter in Mr. Cox's personnel file could give rise to liability for violating Mr. Cox's rights to due process. First, as already noted, the law was clearly established. Second, the termination letter itself contained serious, stigmatizing charges which Mr. Cox had denied. Third, the local press had covered the issue extensively for several months, making it extremely likely that the press or public would request a copy of the termination letter -- which had to be disclosed under the PDA. In these circumstances, a reasonable officer would have expected that the termination letter, once signed and placed in Mr. Cox's personnel file, would be disclosed to the public in very short order.

It was thus clearly established in 1998 that the actions of Defendants Boxer and Farnell could subject them to liability for a liberty-interest, due-process claim, and a reasonable officer would have been able to anticipate that li-

ability in this case. Defendants Boxer and Farnell are thus not entitled to qualified immunity.

It should be noted that, absent the PDA's clear requirement that the termination letter be disclosed, this court would have found that Defendants Boxer and Farnell were entitled to qualified immunity because of the split in the Circuits on the issue of whether, absent such a statute, the placement of a document in a personnel file is sufficient public disclosure. However, given the broad provisions of the PDA, no reasonable Spokane County employee could have any question that under these circumstances, Cox's termination letter was public, subject to PDA disclosure, and extremely likely to be disclosed to the press or the public shortly after Cox was termination. Nor would a reasonable Spokane County officer have doubted that he could be found liable for a violation of Mr. Cox's due process rights if the contents of the termination letter were found to be false and stigmatizing and it was found that Mr. Cox did not receive all of the process he was due.

For the reasons stated above, the individual Defendants Boxer and Farnell are not entitled to qualified immunity. Nor, it should be noted, does Defendant Spokane County enjoy immunity. *See Leatherman v. Tarant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) ("it [is] quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit — either absolute or qualified — under § 1983."); *Wallis v. Spencer*, 202 F.3d 1126, 1143 (9th Cir. 2000) ("There are . . . no personal immunities available vicariously or otherwise to municipal actors under § 1983."). Municipalities can be held liable for the actions of the officers, even if those of-

ficers are immune, if the officers acted pursuant to the municipality's policy or practice or the officers were themselves policymakers for the municipality. *See Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.E.2d 611 (1978). As this court has already held, Ms. Boxer and Mr. Farnell had the authority to terminate Mr. Cox and to draft his termination letter, and therefore were policymakers for whose actions Spokane County is accountable.

V. The Timing and Type of Process

Defendants further contend that this court must grant them summary judgment because they gave Mr. Cox all of the process which he was due. Essentially, they contend that it was enough under the Constitution to allow Mr. Cox to respond to the charges against him in writing before he was terminated.

A description of the process afforded Mr. Cox is necessary to set the stage. In September 1998, Mr. Cox was placed on administrative leave, with pay, pending an investigation into his handling of claims arising out of the Bigelow Gulch road construction. Following an extensive investigation of the Bigelow Gulch claims and other incidents in Mr. Cox's employment, on November 5, 1998, Ms. Boxer and Mr. Farnell wrote to Mr. Cox to inform him that they were considering discipline for him, including possible termination. The letter set forth various charges against Mr. Cox and informed him that he could respond in writing no later than November 12, 1998. Mr. Cox's counsel, upon receiving the letter, requested and received an additional week to respond. His request for a further extension was denied. On November 19, 1998, Mr. Cox responded to the charges, through counsel.

His counsel claimed that Defendants had given Mr. Cox insufficient time to respond.

On December 9, 1998, Ms. Boxer and Mr. Farnell wrote another letter to Mr. Cox in which they stated that they had found additional evidence of improper dealings in the Bigelow Gulch claims and instructed him to respond within two days, no later than December 11, 1998. Mr. Cox responded on December 9, 1998, through counsel. On December 11, 1998, Ms. Boxer and Mr. Farnell terminated Mr. Cox. Mr. Cox never received an in-person hearing with Ms. Boxer, Mr. Farnell, or the Spokane County Commissioners, either before or after he was fired.

In order to determine whether this was sufficient process, this court must apply the three-part test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Under that test, a court determines whether the type and timing of the process given were sufficient by balancing 1) the private interest that will be affected by the official action, 2) the risk that an erroneous deprivation will occur without additional procedure, and 3) the government's interest, which includes the interest in avoiding the fiscal and administrative burdens of providing additional process. *See id.* at 335. There is no fine line between sufficient and insufficient process — a court must consider these factors against the factual backdrop of the case at hand. *See Brady v. Gebbie*, 859 F.2d 1543, 1554 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989) ("when the hearing must be held and what procedural protections must be given at the hearing are determined on a case-by-case basis"); *Brewster v. Board of Ed. of the Lynwood Unified School District*, 149 F.3d 971, 983 (9th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999)

("procedural due process essentially boils down to an ad hcc balancing inquiry"). There is no particular type of process that must be provided if process is due — the required process could be an evidentiary hearing or something considerably less intricate, such as the right to present evidence in writing. *See Brady, supra*, 859 F.2d at 1554. *See also Eldridge, supra*, 424 U.S. at 348 ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances.") In this particular instance, where this court is considering the merits of Defendants' motion for summary judgment, the court's inquiry is limited to determining whether, as a matter of law, the process given was sufficient.

As for the first element of the *Eldridge* test — Mr. Cox's interest in further process — this court finds that Mr. Cox had a strong interest in additional process. Mr. Cox had been an employee of Spokane County for more than 15 years when the Bigelow Gulch claims arose, and he worked in a position imbued with considerable public trust, as he held the power to approve payment of damage claims. The termination letter charges him with a serious breach of that public trust. In short, the letter charges that he had an improper relationship with the owner of the body shop which had done most of the repair work on the Bigelow Gulch cars; he had failed to investigate claims, leading to overpayment and payment for work not performed; and he had failed to respond to the concerns of his superiors, the Spokane County Commissioners. Whether true or false, these charges label Mr. Cox as a man of questionable judgment and character and would make any possible future employer pause before placing Mr. Cox in a position of responsibility.

In addition, the charges were very public. The Bigelow Gulch incident and its aftermath had received considerable coverage in the local newspaper, the *Spokesman-Review*. From Mr. Cox's suspension in September 1998 to his termination in December 1998, Mr. Cox was a repeated target of the newspaper coverage. The articles (described in some detail in this court's earlier orders) display a deep public fascination with Mr. Cox and the various state and local investigations into the matter. Included in the articles were insinuations that unattributable sums of money had appeared in Mr. Cox's bank account during the time of the Bigelow Gulch incident, hints that criminal investigations were underway, and regular reports on the disciplinary process. Although none of the stinging allegations were attributed to any of the Defendants in this case, the newspaper articles are nonetheless relevant to determining the timing and amount of the process Mr. Cox should have received. *See Matthews v. Harney County, Oregon, School Dist. No. 4*, 819 F.2d 889, 894 (9th Cir. 1987). This court holds that given the nature of Mr. Cox's position, the seriousness of the allegations, and the extensive press coverage of the incident, Mr. Cox had a very strong interest in a name-clearing hearing in which he could refute the charges.

The second *Eldridge* factor (the risk of an erroneous deprivation) also suggests that summary judgment is not proper. There is no doubt that Spokane County performed an extensive review of the Bigelow Gulch claims. Spokane County prepared an October 30, 1998, report which provided extensive detail of potential problems with Mr. Cox's handling of the claims. In addition, Spokane County reviewed reports from Washington State auditors who had investigated the matter. However, Mr. Cox received only a limited opportunity to respond and explain

the apparent problems. He was given just two weeks to respond to the initial factual allegations against him, and only 2 days to respond to a supplemental allegation. He was allowed only to respond in writing and did not receive any in-person hearing regarding the allegations of misconduct.

There are also issues of fact concerning whether Defendants adequately reviewed the responses that Mr. Cox provided. The decision to terminate Mr. Cox was apparently made by Ms. Boxer, although the ultimate authority appears to have rested with the Spokane County Commissioners. Ms. Boxer testified in a deposition that two of the three Commissioners ratified the decision to terminate Cox. (Ct. Rec. 71, Ex. B.) Yet two of the Commissioners testified in depositions that they had no recollection of whether the Commissioners ever reviewed or considered Mr. Cox's November 19, 1998, letter in response to the charges made in Ms. Boxer and Mr. Farnell's letter of November 5, 1998; one of those Commissioners indicated that he was never given a copy of the November 19, 1998, letter. (Ct. Rec. 71, Exs. A and C.) There is thus an issue of fact concerning whether the decision to terminate Mr. Cox was made without considering Mr. Cox's responses to the charges against him. The Ninth Circuit has made it clear that providing a person with the form of due process, without also providing him the substantive consideration required by due process, does not satisfy Constitutional requirements. *See Harney County*, *supra*, 819 F.2d at 893-94. There is thus an issue of fact concerning whether Mr. Cox received sufficient consideration of his response. That issue of fact is also extremely material to this case, since if the Commissioners entirely ignored Mr. Cox's responses, there was a very high risk of an improper deprivation of Mr. Cox's liberty interests.

This brings the court to the third *Eldridge* factor, the government's fiscal and administrative interests. Defendants claim that Spokane County had a very strong interest in bringing Mr. Cox's employment to an end without further due process because his position granted him significant power over public funds which the County had a duty to protect. The Supreme Court has recognized that the government has a strong interest in "expeditious removal of unsatisfactory employees." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543, 105 S.Ct. 1493, 84 L.Ed.2d 494 (1985). However, the Court has also recognized that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *See id.* at 544-45. That is precisely what Spokane County did here — Mr. Cox was suspended with pay for 3 months before his termination, thus alleviating any need to terminate him without a more complete hearing. It appears that the government's interest in not providing Mr. Cox with additional process was the interest in not paying him further and in not paying the costs associated with a public hearing. These are not especially compelling interests, as they will arise in virtually every termination of a high-profile employee.

After balancing the interests, the court cannot say that, as a matter of law, Defendants gave Mr. Cox all the process that he was due under the *Eldridge* test. Mr. Cox had a particularly strong interest in protecting his reputation in an environment that had been substantially colored by extensive and unfavorable news coverage. The government's interests in denying Mr. Cox an in-person hearing are particularly weak in comparison. In addition, there is an issue of fact concerning whether the process they did provide put form over substance, thereby creating a great

risk that Mr. Cox would be wrongfully deprived of his liberty interest. This balance does not compel the conclusion that, as a matter of law, Defendants provided him with sufficient process.

The court notes that the foregoing conclusions are supported by numerous cases that the parties have cited to the court or that the court has located and reviewed on its own. In many of these cases, the dispute centered over whether or not the plaintiff had received sufficient *pre-deprivation* due process even though the plaintiff had also received a *post-deprivation* evidentiary hearing. The courts have thus assumed in cases similar to this one that an in-person hearing was required or appropriate after termination, *in addition to* pre-deprivation process similar to that provided in this case.

In *Matthews v. Harney County*, *supra*, for example, a public-school teacher had been fired on stigmatizing grounds amid a whirlwind of unfavorable press coverage. The teacher received minimal pre-deprivation process but within a month after her termination, she received an evidentiary hearing before the high school board. Several months later, she received a further evidentiary hearing before the elementary school board. *See* 819 F.2d at 890-91. Despite this considerable post-deprivation process, however, the Ninth Circuit held that there were issues of fact concerning whether she received sufficient process because of deficiencies in the pre-deprivation process. *See id.* at 892-94. She may not have received due process even though she received two post-deprivation evidentiary hearings before two different bodies. In light of such precedent, this court cannot say that Spokane County's procedures in this case, which involved no in-person hearing of any kind, were sufficient as a matter of law.

Similarly instructive is *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982), another case involving a public school teacher alleging a deprivation of his liberty and property interests without sufficient process. In that case, the teacher had been dismissed without any pre-termination process but had been given a full evidentiary hearing one month after his termination. *Id.* at 775-76. Despite the fact that the former employee had received the opportunity to present evidence and cross-examine the witnesses against him at the post-termination hearing, the Ninth Circuit affirmed an award of damages to the employee for the lack of pre-termination process. *See id.* at 780-81. Again, a full post-termination evidentiary hearing was still not sufficient due process.

If in *Vanelli* and *Harney County*, as in several other cases, an employee's due process rights were not satisfied by a full post-termination evidentiary hearing, then this court cannot hold in this case that as a matter of law Spokane County provided Mr. Cox sufficient due process when they gave him only two weeks to respond in writing and never allowed him the opportunity to present his case in person.

The court notes that Defendants have attempted to distinguish the requirements of *Vanelli*, *Harney County*, and other cases on the grounds that they involved property interests, as opposed to liberty interests. However, the Ninth Circuit has rejected any notion that, as a matter of law, liberty interests are entitled to less process than property interests, by stating that a "liberty interest . . . may or may not [require] more exacting . . . procedures" than a property interest. *See Harney County*, *supra*, 819 F.2d at 893. The fundamental question is whether the process given was sufficient to protect the particular interest at hand. In

this case, the court cannot say that as a matter of law the process was sufficient to protect Mr. Cox's liberty interest and therefore the court must deny Defendant's Motion for Summary Judgment.

VI. Conclusion

IT IS HEREBY ORDERED that Defendants' second Motion for Summary Judgment (Ct. Rec. 58) is DENIED.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and provide copies to counsel.

DATED this 19th day of September, 2000.

JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

CLAUDE COX AND LINDA COX, husband and wife, Plaintiffs, vs. JOHN ROSKELLEY, in his individual capacity; KATE McCASLIN, in her individual capacity; PHILLIP D. HARRIS, in his individual capacity; FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; and SPOKANE COUNTY, a municipal corporation, Defendants.	NO. CS-99-0075-JLQ ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

Before the court is Defendants' Motion for Reconsideration or Certification (Ct. Rec. 49). The court held a hearing on this motion on June 14, 2000. Plaintiffs were represented by Paul Burns. Defendants were represented by Thomas Kirgen.

I. Background

On April 19, 2000, this court granted in part and denied in part Defendants' motion for summary judgment.

The court held that Plaintiff Claude Cox ("Cox") did not have a property interest in his position at Spokane County but that he had stated a genuine issue of material fact concerning whether Defendants had violated his liberty interest in future employment. On May 3, 2000, Defendants requested that this court reconsider its ruling on the liberty interest or, in the alternative, to certify an interlocutory appeal on certain issues. The court has heard argument on the motion and has fully considered the issues and now issues its opinion on the merits of that motion.

The facts of the case are outlined in the court's April 19, 2000, Order. However, it should be noted for the sake of background that Cox claims Defendants implicated his liberty interest in future employment when they terminated him in December 1998. He claims that a September 1998 press release, quotes of Defendants in various newspaper articles, and his December 11, 1998, termination letter all implicated his liberty interest. Defendants' contend that none of those documents implicated his liberty interest and that, even if they did, Cox has not shown that any of the Defendants can be held liable for the infringement on his liberty interest.

II. Liability for Creation and Distribution of the Termination Letter

Much of Defendants' current motion focuses on the contention that this court incorrectly held that Defendants could be held liable for the statements made in the December 11, 1998, letter which informed Cox that he had been terminated from his position as Spokane County's Risk Manager. Defendants lodge several challenges to the court's reliance on the termination letter.

A. Liability for Disclosure According to State Law

Cox's termination letter was distributed to a local journalist only after that journalist requested it under a Washington State statute which requires disclosure of such documents. Defendants claim that they should not be held liable for disclosing the letter in accordance with state law. In the alternative, they request that this court certify an interlocutory appeal of this question.

The request for certification is based on the fact that the Ninth Circuit has apparently not yet ruled on the question of whether disclosure of public documents in accordance with an applicable statute can give rise to a liberty interest claim. The only case cited by the parties which addresses the issue -- and the only case this court located in its own research -- is *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989). In *Buxton*, the plaintiff claimed that his termination letter stigmatized him, although it had only been placed in his personnel file and was not distributed to the press. *See id.* at 1042-46. The plaintiff contended that the letter had nonetheless been made public because a state statute made all public employee records accessible to the public (and future employers). The Eleventh Circuit agreed, holding that "the stigmatizing information placed into the public record by a state entity, pursuant to a state statute or otherwise, constitutes sufficient publication to implicate the liberty interest under the due process clause . . ." *Id.* at 1046.

Cox urges this court to follow the Eleventh Circuit, while Defendants urge this court to reject *Buxton* as placing an unfair burden on governments which comply with applicable law. However, of the rule announced in *Buxton*

and the rule proposed by Defendants (that disclosure pursuant to a statute cannot give rise to liability), only the *Buxton* rule offers sufficient protection for the liberty interests of public employees. A public employee's liberty interest has been implicated when his government employer "impose[s] on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

If this court were to adopt Defendants' position, a government employer could falsely and wrongfully stigmatize an employee and disable that employee from ever finding work again, so long as the employer disclosed its defamatory documents only when a member of the public requested that they do so. Defendants' rule would put form over substance. The *Buxton* rule, on the other hand, properly places the burden on the government to ensure that its charges against employees are truthful and accurate, regardless of whether the government plans to publicize those charges on its own initiative. This court will not adopt a rule that would allow municipalities to use statutory obligations to shield stigmatizing comments from judicial review. Public disclosure, whether required by statute or not, is still public disclosure. As the *Buxton* court noted, "[p]rotection of the due process name clearing right cannot be effectively afforded any other way." *See Buxton*, 871 F.3d at 1045.

The termination letter, therefore, is subject to review by this court for the purposes of considering Plaintiffs' claim of liberty interest deprivation without due process. The court does not find that there is sufficient question

about what the proper rule is to warrant certification of the issue for appeal. That request is denied.

B. The Contents of the Termination Letter

Defendants also argue that this court erred when it held that the termination letter raised an issue of fact as to whether Defendants implicated Cox's liberty interest. As noted in the court's April 19, 2000, Order, the government implicates an employee's liberty interest if it impugns his "reputation for honesty or morality," *Matthews v. Harney County, Oregon, School District No. 4.*, 819 F.2d 889, 891 (9th Cir. 1997), or puts his "good name, reputation, honor, or integrity . . . at stake." *Roth*, *supra*, 408 U.S. at 573. In contrast, "a charge of incompetence or inability to get along with coworkers . . . does not" give rise to a liberty interest claim. *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 365 (9th Cir. 1976).

Defendants argue, as they did in the briefing of the motion for summary judgment, that the termination letter charges Cox with incompetence and poor management but does not question his honesty, morality, honor, or good name. Once again, in determining whether an issue of fact exists, the court rejects this claim.

The letter, read as a whole, arguably charges Cox with dishonesty. *Inter alia*, the letter includes the following charges regarding his relationship with Ken Orrino, the owner of Specialty Auto, and Cox's approval of claims submitted by Specialty Auto:

- "A[n] example of inappropriate handling and/or processing of claims was that of RAC Trucking.

That claimant is a long-haul driver. He has advised that he has not had time to take his truck in for repair. However, you approved a payment of $2,187.96 to Specialty for repairs and cleaning that were never done." (Ct. Rec. 22, Ex. 5, p. 2.)

- "In addition to your failure to properly handle and process claims, you also used poor judgment in your conversation with Phil Camp at Camp Automotive, Inc. upon learning that one of his employees had called County Commissioners Office with concerns of a possible over-charging by Specialty for services it was providing. Instead of being concerned about overcharges, you advised Mr. Camp that you did not like being called on the carpet by your superiors based upon a telephone call from one of his employees." (p. 2-3.)

- "Lastly we believe it is inappropriate for you to suggest to department staff that they take their automobiles to Specialty for auto repair when you have the discretion to direct a significant amount of County business to Specialty. Neither is it appropriate to encourage other County employees, who are interested in purchasing automobiles, to contact Mr. Orrino who you refer to as 'your friend in the business.' Likewise, your engaging in personal business transaction(s) with Mr. Orrino, when you have the discretion to direct a significant amount of County business to Specialty, is not good managerial judgment." (p. 3.)

While the termination letter dresses up these and other allegations as charges of only "poor judgment" and incompetence, they are substantially more than that. The

passages quoted above arguably charge Cox with maintaining a personal relationship with a body shop owner who billed the County for work he did not do, yet was nonetheless paid for because Cox approved the payment. And when someone expressed concern about the overall arrangement, Cox allegedly verbally abused him. There is no doubt that these charges, if true, establish extremely poor judgment on Cox's part (and of course, Plaintiffs bear the burden proving that the statements in the termination were false). But the charges in the letter also arguably implicate his reputation for honesty or morality, as they give the reader the distinct impression that Cox was favoring his friend and trying to keep it quiet.

This is not to say that the statements in the termination letter were false and stigmatizing as a matter of law. Rather, this court merely holds that an issue of fact exists as to whether the termination letter contains false statements which implicate Cox's reputation for honesty or morality.

Defendants also claim that this court erroneously concluded that the termination letter raised an issue of fact only in light of the earlier newspaper articles. Defendants are incorrect. The Order states that "genuine issues of fact exist as to whether the Defendants defamed Mr. Cox's reputation for honesty or morality, particularly when one considers that [the charges in the termination letter] were made in light of the numerous newspaper articles on the incident." It is clear from this passage that the court found the termination letter problematic when viewed in isolation. The court has not ruled that the newspaper articles are admissible at trial. In any event, the court now explicitly holds that the termination letter, on its own and without consideration of the circumstances in which it was

disclosed, raises issues of fact as to whether the letter falsely implicated Cox's reputation for honesty or morality.

C. Distribution by Placement in the Personnel File

Defendants also claim that they cannot be held liable for the statements in the termination letter because none of the Defendants named in this case actually distributed the letter to the public (the letter was distributed by County prosecutor Jim Emacio). Cox counters that it makes no difference who distributed the termination letter because it is enough that it was placed in Cox's personnel file and thus subject to possible disclosure to the public.

This issue presents the court with an interesting question. While the Ninth Circuit has noted that some courts have held that placement of a document in a personnel file is sufficient disclosure for a liberty interest claim, it has not yet decided the issue. *See Mustafa v. Clark County School District*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998). Those Circuits which have addressed the issue are evenly divided. The Second, Fourth, and Eleventh Circuits have all concluded that the placement of a document in a personnel file is sufficient to give rise to a liberty interest claim. *See Donato v. Plainview School District*, 96 F.3d 623, 631-32 (2d Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); *Buxton*, *supra*, 871 F.2d at 1044-45. In addition, *Codd v. Velger*, 429 U.S. 624, 625-627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) appears to support this position since the Court in that case assumed, without actually ruling, that the placement of a document in a public employee's personnel file is sufficient to give rise to a liberty

interest claim. However, the First, Third, and Seventh Circuits have all held squarely to the contrary. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139, 1148 (3d Cir. 1988); *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998).

This court will follow the Second, Fourth, and Eleventh Circuits in holding that placement of a document in a public employee's personnel file is sufficient disclosure of that document to the public for the purposes of a due process liberty interest claim. As discussed earlier when this court held that distribution pursuant to statute can give rise to liability, government employers bear the burden of ensuring that charges in connection with employee terminations are accurate and not defamatory. If a government official places a statement about a terminated employee in a personnel file that is subject to public inspection, the official should be held liable if the statement proves to be defamatory. This rule will not, as Defendants appear to claim, impose liability on innocent parties. Rather, the rule imposes liability only where the official 1) makes defamatory statements in connection with termination of an employee and 2) places those statements where they can be viewed by the public.

Defendants claim that this holding is contrary to *Bishop v. Wood*, 426 U.S. 341 (1976), but it is not. While *Bishop* made it clear that a liberty interest plaintiff must establish that the charges were made public, that case is materially distinguishable from this case. *Bishop* involved allegedly false charges that were made orally and only to the employee in private. *See id.* at 348. (They were also made in response to interrogatories during litigation but

that was held to be not in connection with the termination. *See id.* at 348-49.) There was no evidence that the *Bishop* defendants had ever mentioned the charges to a member of the public or that they had made the charges accessible to the public. *Bishop* does not address the situation at issue here, where the charges were made available to the public but were not actually distributed by the same person who made them accessible. This court believes that the best, and proper, rule is that government employers can be held liable if they place a stigmatizing and false allegation into a publicly accessible personnel file.

The termination letter explicitly provides that a "cc" copy will be placed in Cox's personnel file. Therefore, because there is a genuine issue of fact as to whether that letter falsely implicated Cox's liberty interest, there is a genuine issue of fact as to whether the person(s) who caused that letter to be placed in Cox's file deprived Cox of his liberty interest without due process of law. As Defendants Francine Boxer and Marshall Farnell signed the letter, there is a genuine issue of fact as to whether they deprived Cox of his liberty interest without due process of law.

III. The Liability of the Individual Defendants

Defendants also contend that, even if the termination letter was defamatory, Plaintiffs have not established a genuine issue of material fact as to whether any Defendant deprived Cox of his liberty interest. The court considers this argument with regard to each individual Defendant.

A. Francine Boxer

Defendant Francine Boxer is the Spokane County Administrator. As already noted, because Ms. Boxer signed the termination letter, there is a genuine issue of material fact as to whether Ms. Boxer deprived Cox of his liberty interest without due process of law. Ms. Boxer was also quoted in several *Spokesman-Review* articles about the investigation of Cox, but this court need not consider whether those quotes also raise genuine issues of material fact.

B. Marshall Farnell

Defendant Marshall Farnell, Spokane County's Director of Administrative Services, also signed the termination letter. Therefore, there is a genuine issue of material fact as to whether Mr. Farnell deprived Cox of his liberty interest without due process of law.

C. Phillip Harris

Defendant Phillip Harris, a Spokane County Commissioner, did not sign the termination letter. Nor is there any statement in the newspapers or elsewhere attributed to Commissioner Harris. Commissioner Harris is therefore entitled to summary judgment as to Cox's liberty interest claim and Plaintiffs' claims against him shall be dismissed with prejudice.

D. Kate McCaslin

Defendant Kate McCaslin, a Spokane County Commissioner, did not sign the termination letter, but she was quoted or named as a source in three separate newspaper

articles. On September 10, 1998, the *Spokesman-Review* quoted her as saying that the state auditor's investigation would answer "How were those vendors selected? How were people referred? How did they arrive at the price they charge people? How did they determine what work actually needed to be done?" (Ct. Rec. 24, Ex. 6.) On September 30, 1998, the paper reported that she had said, "We're going to get to the bottom of this and we'll inform the public at the appropriate time. I don't think we have anything to hide, although we might have something to be embarrassed about." (Ct. Rec. 24, Ex. 9.) On November 3, 1998, a newspaper article stated that Commissioner McCaslin had indicated that a decision on Cox's future employment would be made in the near future. (Ct. Rec. 24, Ex. 12.)

Cox also claims that Commissioner McCaslin was the source of numerous other press leaks that were not attributed to any particular source, but he has submitted absolutely nothing to support that contention. As for the statements that the paper did attribute to Commissioner McCaslin, there is nothing about them that implicates Cox's reputation for honesty or morality. Rather, Commissioner McCaslin was merely commenting on the scope of the state auditor's investigation and deferring comment on the substance of the investigation. There is no genuine issue of material fact as to whether Commissioner McCaslin made any statement that implicated Cox's liberty interest. Commissioner McCaslin is therefore entitled to summary judgment as to Cox's liberty interest claim and this court will dismiss Plaintiffs' claims against her with prejudice.

E. John Roskelley

The *Spokesman-Review* twice quoted Defendant John Roskelley, also a Spokane County Commissioner. According to the September 10, 1998, article, he said, "I don't feel comfortable spreading rumors. There were concerns over the quality of work being done, that maybe they were too overzealous in cleaning and doing the work." (Ct. Rec. 24, Ex. 6.) This statement does not defame Cox's honesty or morality. In fact, it defers comment on the allegations and appears to discuss Specialty Auto's actions, not what Cox allegedly did or did not do.

The second quote, which appeared in the September 30, 1998, article, read, "If he gets cleared of wrongdoing, he'll be reinstated." (Ct. Rec. 24, Ex. 9.) This statement requires further examination. As Cox points out, Commissioner Roskelley's statement specifically links Cox's termination to whether he had committed "wrongdoing." Cox argues that this meant that if he was reinstated, he had done nothing wrong, but if he was fired, the implication would be that the County had uncovered "wrongdoing." An allegation of "wrongdoing," while vague, arguably implicates the honesty or morality of the person targeted by the allegation, although the court does not rule on whether it is because such a ruling is unnecessary.

This court agrees with Defendants that the "wrongdoing" statement does not implicate Cox's liberty interest. First, and most importantly, Commissioner Roskelley did not state that Cox had done anything wrong, only that his employment would turn on the outcome of the investigation. There was no actual charge of wrongdoing leveled in this statement by Commissioner Roskelley.

Second, in order to reach the conclusion urged by Plaintiffs (that Commissioner Roskelley impliedly stated that Cox's termination was the result of "wrongdoing") one would have to combine this September 30, 1998, statement with the fact of Cox's December 11, 1998, termination. The two-and-a-half-month gap is simply too long to support a finding that Commissioner Roskelley implicated or damaged Cox's reputation for honesty or morality. The statement does not raise a genuine issue of material fact as to whether Commissioner Roskelley deprived Cox of his liberty interest without due process of law.

As there are no other statements attributed to Commissioner Roskelley, and he did not sign the termination letter, the court will enter summary judgment in his favor on the liberty interest claim and dismiss Plaintiffs' claims against him with prejudice.

IV. The Liability of Spokane County

Defendants also ask this court to revisit its holding that Spokane County may be held liable for the actions of its officers. This argument is based on Defendants' contention that Cox has not stated a genuine issue of material fact as to the individual Defendants. As already noted however, the court has not revised its earlier holding that Cox has stated a genuine issue of material fact as to whether Defendants Boxer and Farnell deprived him of his liberty interest without due process of law. Since Boxer and Farnell had the authority to terminate Cox and to write his termination letter, Spokane County may be held liable if it is found that Boxer and Farnell deprived Cox of his liberty interest without due process of law. *See Monell v. Dept. of Social and Health Services of the City*

of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

V. The Issue of Falsity

At the hearing on the motion for reconsideration, there was considerable discussion regarding whether Cox had raised a genuine issue of material fact as to whether the charges made in the termination letter are false. Cox must show that the charges were both stigmatizing *and* false in order to recover. *See Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). However, Cox's affidavit makes it clear that he denies all of the charges made in connection with his termination. (Ct. Rec. 31.) This is sufficient to raise a genuine issue of material fact about the truth or falsity of the statements.

VI. Conclusion

Defendant's Motion for Reconsideration (Ct. Rec. 49) is **GRANTED IN PART** and **DENIED IN PART**. Defendants Harris, McCaslin, and Roskelley are entitled to summary judgment, and the claims against them are **DISMISSED WITH PREJUDICE**. Summary judgment is denied as to Defendants Boxer, Farnell, and Spokane County. Defendants' Motion for Certification (Ct. Rec. 49) is **DENIED**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and provide copies to counsel.

DATED this 15th day of June, 2000.

JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

CLAUDE COX AND LINDA COX, husband and wife, Plaintiffs, vs. JOHN ROSKELLEY, in his individual capacity; KATE McCASLIN, in her individual capacity; PHILLIP D. HARRIS, in his individual capacity; FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; and SPOKANE COUNTY, a municipal corporation, Defendants.	NO. CS-99-0075-JLQ MEMORANDUM ORDER AND OPINION RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the court are Defendants' Motion for Summary Judgment (Ct. Rec. 18) and Motion to Strike (Ct. Rec. 35). The court held a telephonic hearing on this motions on March 27, 2000. Plaintiffs were represented by Paul Burns. Defendants were represented by Thomas Kingen and Mary Gaston.

I. Facts

Plaintiff Claude Cox ("Cox") is a former employee of Defendant Spokane County. Defendants John Roskelley, Kate McCaslin, and Phillip Harris are all Spokane County Commissioners. Defendant Francine Boxer is the Spokane County Administrator, and Defendant Marshall Farnell is Spokane County's Director of Administrative Services.

This dispute arises out of the Cox's termination by Spokane County on December 11, 1998, after an investigation into his performance as the County's Risk Manager. The exact details of the investigation and termination are not relevant to the current motion, but a brief sketch of the facts is necessary to provide context.

As the Risk Manager, Cox had the authority to settle lawsuits filed against Spokane County and independent authority to issue checks in connection with the settlements. On July 27, 1998, Spokane County incurred substantial liability for damage caused to private cars when the County sprayed hot tar during its paving of Bigelow Gulch Road. Cox was in charge of seeing that the proper repairs were made to the damaged cars and that Spokane County paid for those repairs.

Most of the repairs were performed by Specialty Auto and Truck Painting, Inc. ("Specialty Auto"). In August 1998, Spokane County began to receive complaints that Specialty Auto was overcharging for repairs and charging for repairs it had not made. Defendants Boxer and Roskelley approached Cox about the complaints and asked him to look into the problem. There is substantial dispute about whether Cox ever did anything, but it is undisputed

that the Washington State Auditor's Office reviewed the matter. On September 29, 1998, in response to the Auditor's report, Defendants Boxer and Farnell placed Cox on administrative leave with pay pending further investigation. Spokane County publicly disclosed, via press release, that Cox had been suspended pending investigation of the Bigelow Gulch incident.

As a result of the investigation, Defendants became concerned about Cox's job performance. Defendants twice allowed Cox an opportunity to explain, in writing, an apparent conflict of interest in dealing with Specialty Auto. Of particular concern was the fact that it appeared Cox's wife had purchased a car from the owner of Specialty Auto and that Cox may have received a rebate of the purchase price. They were dissatisfied with the explanations and terminated him on December 11, 1998.

Cox filed this suit on March 17, 1999, alleging that defendants had violated his Fourteenth Amendment right to procedural due process, thereby giving rise to liability under 42 U.S.C. § 1983. Defendants have moved for summary judgment on the limited grounds that Plaintiffs have not shown a cognizable life, liberty, or property interest which would trigger the procedural due process protections.

At the center of the present dispute are alleged facts which Plaintiffs claim establish that Cox had a property interest in his job and a liberty interest that was implicated by Defendant's actions. As to the alleged property interest, Plaintiffs claim that oral statements made to Cox at the time of his hiring and over his tenure, combined with his experiences on the job, created an employment contract that could be terminated only upon a showing of

just cause. As for the alleged liberty interest, Plaintiff claims that Defendants made numerous false and defamatory statements that ruined his reputation. The exact statements in question are discussed in detail later in this opinion.

II. Motion to Strike

Defendants have moved to strike significant portions of Claude Cox's affidavit on hearsay grounds. As Defendants point out, affidavits which support or oppose a motion for summary judgment must "set forth facts such as would be admissible in evidence." FRCP 56(e). If an affidavit makes assertions that would not be admissible at trial, they cannot be considered for the purposes of summary judgment. *See Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir. 1990).

Before reaching the merits of the motion, the court notes that Plaintiffs did not respond to the motion to strike. Ordinarily, this would be grounds for granting the motion. *See* Local Rule 7.1(h)(5). However, the motion to strike cuts at the heart of Plaintiffs' property interest claim, and if this court were to grant the motion to strike, it would effectively grant the motion for summary judgment on the property interest claims. The Ninth Circuit forbids the entry of default summary judgment. *See In re Rogstad*, 126 F.3d 1224, 1227 (9th Cir. 1997). Therefore, this court will consider the merits.

The two challenged assertions in the Cox affidavit are out-of-court statements offered for the truth of the matter asserted. Those passages, which relate to what Cox claims he was told during a 1996 disciplinary proceeding against him, are as follows:

> I was subjected to discipline in October, 1996. Spokane County Prosecuting Attorney Jim Emacio explained to me at that time that then County Commissioner Steve Hasson wanted to discharge me from my employment at that time. However, Emacio told me he explained to the county commissioners that my employment could be terminated only for just cause and that there was insufficient cause to discharge me.
>
> * * *
>
> Some time after I was discharged [in 1996], I had a conversation with Spokane County Prosecuting Attorney Jim Sweetser regarding the termination of my employment. During that conversation, Mr. Sweetser confirmed the County's understanding that I would be discharged from my employment only for just cause. Mr. Sweetser explained to me that Deputy Prosecuting Attorney Jim Emacio had advised the Spokane County Board of County Commissioners that I could be discharged only for just cause, and that the county did not have just cause to discharge me . . . . (Ct. Rec. 31, ¶¶ 4, 5.)

Defendants urge this court to ignore these factual assertions because they are, Defendants claim, inadmissible under Federal Rule of Evidence 802. However, Defendants appear to have overlooked the hearsay exemption for admissions by a party opponent.

Under FRE 801(d)(2), party admissions are not hearsay if they are offered against that party. There are several ways in which a statement can become an admission, among them "a statement by the party's agent or servant

concerning a matter within the scope of the agency or employment, made during the existence of the relationship." FRE 801(d)(2)(D). Defendants do not claim that either Emacio or Sweetser were not employees of Spokane County at the time the statements were made, or that the determination of Cox's employment status was not within the scope of their employment. Therefore, this court DENIES Defendants' Motion to Strike.

III. The Merits of the Motion for Summary Judgment

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the material facts before the court. *See Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in favor of the nonmoving party, there are no genuine issues of material fact in dispute. *See* Fed.R.Civ.P. 56(c). The moving party does not have to disprove matters on which the opponent will bear the burden of proof at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.E.2d 202 (1986). "In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), *quoting* FRCP 56.

In this case, Plaintiffs bear the burden of showing a genuine issue of material fact that could entitle them to recover under 42 U.S.C. § 1983. That section allows an

individual to recover damages from state actors for violations of federal Constitutional rights. In this case, Plaintiffs claim that Defendants violated Cox's right to procedural due process.

In order to recover on this theory, Plaintiffs must show that 1) Cox had a life, liberty, or property interest that was implicated by his termination, and 2) that Defendants deprived Cox of that interest without giving him due process. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986). Defendant's present motion focuses only on the first prong of Plaintiffs' due process claim by alleging that Cox never had a cognizable interest that would trigger due process protections. In order to survive the motion, then, Plaintiffs must show that a genuine issue of material fact exists as to whether he had such an interest. *See, e.g., Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998).

A. Property Interest

The issue presented as to the property interest is whether, under Washington law, a non-negotiated oral promise of "for cause" employment made by an employer to a prospective employee is sufficient to create a cognizable property interest under the Due Process Clause. While at first blush it may seem that such a statement or promise would give rise to "for cause" employment (and thus a property interest), the law is to the contrary.

Property interests do not arise under the federal Constitution; rather, the federal Constitution protects property interests which have arisen under state law. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.E.2d 548 (1972). Yet not every state-

recognized property right gives rise to the right to federal due process. "To have a property interest . . . a person clearly must have more than an abstract need or desire for [the property]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

A government employee may have a cognizable property interest in continued employment, but such an interest exists only if the employee cannot be terminated except "for cause." *See, e.g., Brady v. Gebbie*, 859 F.2d 1543, 1548 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989), *citing Dorr v. County of Butte*, 795 F.2d 875, 876 (9th Cir. 1987). By contrast, an employee who may be terminated by her employer "at will" does not have a sufficient expectation of continued employment to trigger due process protections. *See id.*

The key, then, is to determine whether Cox was a for-cause or at-will employee under Washington State law. In Washington, the general rule is that all employees are at-will, unless an exception applies. *See, e.g., Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 223, 685 P.2d 1081 (1984). Washington case law recognizes several exceptions to the general rule, but the only exceptions relevant here are the existence of either 1) an *express* employment contract or 2) an *implied* employment contract. *See id.* at 232. Plaintiffs apparently rely on only the implied contract theory, but this court will analyze both theories.

1. Express Contract Theory

Under Washington law, an express contract to modify the at-will nature of employment exists only when the tra-

ditional elements of contract — offer, acceptance, and consideration — are present. *See id.* at 228. There are at least two reasons why the allegations in this case, even if true, do not satisfy this requirement.

First, as in traditional contract formation, "only when the parties specifically bargain for [the] security [of 'for cause' employment] will the law require just cause for termination." *Siekawitch v. Washington Beef Producers, Inc.*, 58 Wash.App. 454, 462, 793 P.2d 994 (1990), *citing Touissant v. Blue Cross and Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980). In this case, Plaintiffs have offered one piece of evidence which might support a finding of an express contract: Cox's testimony that he was told in his initial interview that he would be a "for-cause" employee. Yet Cox admits that he did not ask what his status would be and that at the time he did not even know what "for cause" meant. If he did not request information about his employment status, and did not know what the term meant, one can hardly say that he bargained for "for-cause" employment. Rather, "his reliance on [the interviewer's] statement only reveals a subjective belief derived from statements typical in employment interviews . . . ." *Siekawitch*, 58 Wash.App. at 462.

Independent of this problem, however, Plaintiffs have not shown, or even alleged, that Cox gave sufficient consideration for Defendants' "promise" of "for-cause" employment. Under Washington law,

> [there] must be consideration *in addition to* required services which results in a detriment to the employee and a benefit to the employer. . . . [T]he foregoing of other job opportunities is not sufficient independent

> consideration to defeat an employer's right to terminate at will.

Roberts v. Atlantic Richfield Co., 88 Wash.2d. 887, 895-96, 568 P.2d 764 (1977) (emphasis added), *citing Heideman v. Tall's Travel Shops*, 192 Wash. 513, 516-17, 73 P.2d 1323 (1937). *See also Thompson*, *supra*, 102 Wash.2d at 223-24 (agreement signed by employee assigning rights to inventions to employer was insufficient consideration to give rise to an express contract).

Plaintiffs have not demonstrated that a genuine issue of material fact exists as to the existence of an express contract creating "for-cause" employment.

2. Implied Contract Theory

Even in the absence of an express contract, an employer may have created an implied contract of "for-cause" employment if "the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstance of the case" indicate that the parties impliedly altered the at-will nature of the employee's position. *See Roberts v. Atlantic Richfield Co.*, 88 Wash.2d 887, 894, 568 P.2d 764 (1977), *citing Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

To that end, Plaintiffs claim that Cox's collective experiences while employed by Spokane County lead to the conclusion that he could be terminated only for cause. Plaintiffs allege three facts which the court has already discussed: the statement made in 1983 by Cox's interviewer and the two statements made by Spokane County prosecutors when Cox was disciplined in 1996. (Ct.

Rec. 31, ¶¶ 3, 4, 5.) Plaintiffs have not produced anything written which shows that Cox was a "for-cause" employee, nor has he alleged that such a writing ever existed.

The fact that Plaintiffs have not produced any written statement is fatal to the claim that there was an implied employment contract. Washington law is clear that an implied employment contract cannot exist unless the plaintiff relies, at least in part, on a written document.

> [Oral] statements are not sufficient to create a genuine issue of material fact as to the existence of an enforceable promise of continued employment in a specific job. . . . Oral assurances of continued employment and an employee's forgoing of employment opportunities do not create an implied employment contract.

Lawson v. Boeing Co., 58 Wash.App. 261, 547-48, 792 P.2d 545 (1990), *review denied*, 116 Wash.2d 1021 (1991), *citing Roberts*, *supra*, 88 Wash.2d at 894-96. *See also Smoot v. Boise Cascade Corp.*, 942 F.2d 1408, 1410-11 (1991) (holding that, under Washington law, an implied "for cause" contract does not arise, as a matter of law, where the employee relies solely on the employer's oral statements); *Winspear v. Boeing Co.*, 75 Wash.App. 870, 880-881, 880 P.2d 1010 (1994), *review denied*, 126 Wash.2d 1006 (1995) (same). *Compare*, *e.g.*, *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 104-06, 864 P.2d 937 (1994) (issue of fact remained as to implied contract because plaintiff relied in part on written statements by the employer).

At the hearing, Plaintiffs attempted to distinguish this line of cases on the basis that they allegedly stand only for the proposition that an oral statement is not sufficient to alter the at-will nature of employment once that employment has commenced. Under this line of argument, this case is different because Plaintiffs have alleged that Cox was told before he accepted the job that he would be a "for-cause" employee.

It is true that in some of the cases cited above, the alleged oral promises of "for-cause" employment did not occur before or at the commencement of employment. *See, e.g., Winspear, supra.* However, in one of the key cases in this line, *Lawson, supra*, the court did not specify when the alleged oral promises occurred and, as noted above, stated without exception that "[oral] statements are not sufficient to create an issue of material fact as to the existence of an [implied employment contract]." 58 Wash.App at 264-65.

The Ninth Circuit followed *Lawson* in *Smoot, supra*, a case in which the employee alleged that the employer, in order to induce him to leave union employment for a new job in management, orally promised him that he would continue to be a "for-cause" employee in the new position. 942 F.2d at 1409. The court held that Washington law foreclosed the existence of an implied contract in this circumstance, as a matter of law. *See id.* at 1410-11.

As in *Smoot*, the alleged oral promises in this case were made at the inception of a new employment relationship, and were allegedly made to induce the employee to accept the offered position. In addition, the language of the Washington cases does not suggest the distinction

Plaintiffs have urged on this court. Plaintiffs' attempt to distinguish the cases fails.

Plaintiffs have not stated any issue of fact that might support a finding of an express or implied employment contract under Washington law. By extension, they have not stated any issue of fact that might support a finding that Cox had a property interest in his position with Spokane County. Therefore, this court must grant Defendants' motion for summary judgment as to Plaintiffs' claim that Defendants deprived him of a property interest without due process of law when he was terminated in December 1998.

B. Liberty Interest

Plaintiffs claim that, independent of whether Cox was a "for-cause" employee, Defendants infringed on his liberty interests when they publicly disclosed the reasons for his termination without granting him a hearing. Under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.E.2d 548 (1972), "'(w)here [an employee]'s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are'" required because his liberty interests are at stake. *Id.* at 573, *quoting Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). However, before a plaintiff can establish a right to a *Roth* hearing (and any damages resulting from the failure to provide such a hearing), he must establish that the charges against him carry a "stigma of moral turpitude." *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 365 (9th Cir. 1976). "A charge of incompetence or inability to get along with coworkers . . . does not" infringe upon the liberty interest. *Id.* In other words, the charges must impli-

cate the plaintiff's "reputation for honesty or morality." *See Matthews v. Harney County, Oregon, School District No. 4*, 819 F.2d 889, 891 (9th Cir. 1987).

If a plaintiff can clear this hurdle, he must also demonstrate that "1) the accuracy of the charge is contested, 2) there is some public disclosure of the charge, and 3) the charge is made in connection with termination of employment." *Id.* And, finally, before a plaintiff can recover under *Roth*, he must demonstrate that the publicly disclosed, defamatory material was actually false. *See Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) ("the absence of any . . . allegation or factual finding [of falsity] is fatal to [an employee's] claim under the Due Process Clause that he should have been given a hearing.")

Plaintiffs rely on several documents to support their claim that Defendants created and publicly circulated a false and defamatory impression of Cox. At the forefront are a series of articles about the Bigelow Gulch repairs, which appeared in the *Spokesman-Review* from September through December 1998. What those articles had to say about Cox are summarized below:

> September 10, 1998: The article announces that Cox was being investigated for possibly funneling repairs related to the Bigelow Gulch project to Specialty Auto and another body shop. (Ct. Rec. 24, Ex. 6.)
>
> September 30, 1998: The *Spokesman-Review* reports that the investigation was continuing and that Cox had been suspended for the third time in two years. (Ct. Rec. 24, Ex. 9.)

November 12 and 26, 1998: Articles report on other aspects of the incident and mention Cox only in passing to state that he remained on leave pending investigation. (Ct. Rec. 24, Exs. 13 and 14.)

December 3, 1998: The article states that the investigation was still under way. The article also reported that the County Commissioners would not say anything other than that a decision on Cox's employment was pending. (Ct. Rec. 24, Ex. 12.)

December 10, 1998: The newspaper reports that state auditors had investigated Cox's private bank account and discovered that unusually large sums of money had passed through it in 1998. (Ct. Rec. 24, Ex. 15.)

December 13, 1998: The paper reports that Cox had been terminated. The article did not state the reason for the termination, but it did quote Defendant Boxer as saying that Defendants had waited until they "had enough" evidence to justify a termination. The article also recounted several details of the incident, including that Specialty Auto was under criminal investigation and that Cox has been suspended twice in 1996, once for hiring a friend and lying about it and another time for using "earthy" sexual language. (Ct. Rec. 24, Ex. 16.)

In addition to these articles, Plaintiffs point to a press release and the release of Cox's termination letter. The press release and the termination letter are the only written publications attributable directly to Defendants. The two-sentence press release stated nothing more than that Cox had been placed on administrative leave pending in-

vestigation of the Bigelow Gulch incident. (Ct. Rec. 24, Ex. 8.)

The termination letter was released to the press on December 18, 1998, by Deputy Prosecutor James Emacio following a Freedom of Information Act request. (Ct. Rec. 30, Ex. B.) Apparently, no newspaper article appeared after the release of the letter. The letter itself lists several reasons for Cox's termination, including a failure to respond adequately to inquiries from Spokane County Commissioners about the review process for claims submitted by Specialty Auto, an indication that Cox approved bills from Specialty Auto when other shops had bid less, an allegation that Cox reacted defensively to suggestions that Specialty Auto was overcharging for repairs rather than with concern that a problem might exist, and evidence that Cox had engaged in personal business transactions with the owner of Specialty Auto. (Ct. Rec. 22, Ex. 5.)

Plaintiffs claim that these two documents show that Defendants publicly released false and defamatory information about Cox, thereby implicating his liberty interest. Defendants offer several reasons why they have not infringed on that interest.

The first, and by far the least persuasive, is that the newspaper articles, press release, and termination letter do not touch upon Cox's reputation for honesty or morality. The argument is that, at most, the documents state that there was an "appearance" of inappropriate association between Cox and Specialty Auto, rather than an actual accusation of such an association. This distinction is lost on the court. The termination letter in particular indicates that because of Cox's behavior, Spokane County paid ex-

cessive and specious bills from a body shop whose owner had conducted personal business with Cox. In addition, the letter indicates that when Cox's supervisors inquired about the bills, he reacted defensively and refused to change his procedures. Genuine issues of fact exist as to whether the Defendants defamed Mr. Cox's reputation for honesty and morality, particularly when one considers that they were made in the light of numerous newspaper articles on the incident that even more directly implicated Cox's reputation for honesty and morality.

As to the truth or falsity of the statements, Cox has repeatedly denied the allegations made in the newspaper and in his termination letter, both at the time of newspaper articles and in declarations before this court. Cox has stated a genuine issue of material fact as to the truth or falsity of the allegations Defendants made in their termination letter.

This court will not enter summary judgment in favor of Defendants, as Plaintiffs have raised a genuine issue of material fact as to whether the statements made by Defendants were false and defamatory under *Roth.* Defendants have argued that Spokane County cannot be held liable for the actions of its employees absent a Spokane County policy or practice which infringes upon liberty interests, under *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.E.2d 611 (1978). However, as *Monell* itself makes clear, "local government bodies may be sued directly under § 1983 for . . . relief, where, as here, the action that is alleged to be unconstitutional implements . . . a decision officially adopted and promulgated by that body's officers." *Id.* at 690. Spokane County is not entitled to summary judgment under *Monell* because Plaintiffs have alleged that his liberty interest was

erty interest was infringed upon by the Spokane County officers who had the authority to terminate him. Spokane County can be held directly liable for the acts of its authorized officers, regardless of whether there was an official policy or practice governing those acts. *See generally Owen v. City of Independence*, 445 U.S. 622 (1980) (city could be held liable under *Monell* for city official's acts which infringed employee's liberty interests even though there was no applicable policy and the official had acted in good faith).

Plaintiffs have stated a genuine issue of material fact as to whether Defendants infringed upon Cox's liberty interest. The court therefore DENIES Defendants' motion for summary judgment on the liberty interest issue.

III. Conclusion

Defendants' Motion for Summary Judgment (Ct. Rec. 18) is GRANTED IN PART as to the property interest and DENIED IN PART as to the liberty interest. Defendant's Motion to Strike (Ct. Rec. 35) is DENIED.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and provide copies to counsel.

DATED this 17th day of April, 2000.

JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAUDE COX, husband; LINDA COX, wife, Plaintiffs - Appellees, v. FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; SPOKANE COUNTY, a municipal corporation, Defendants - Appellants.	No. 00-35887 D.C. No. CV-99-00075-JLQ MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, Senior District Judge, Presiding

Argued and Submitted July 10, 2002
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Before: HALL, TASHIMA, and RAWLINSON, Circuit Judges.

Appellees Claude Cox ("Cox") and Linda Cox ("Linda") brought a 42 U.S.C. § 1983 action against Spokane County Administrator Francine M. Boxer ("Boxer"), Spokane County Director of Administrative Services Marshall Farnell ("Farnell"), and Spokane County (the "County"), alleging that Boxer's and Farnell's termination of Cox from his employment as Spokane County Safety/Loss Manager[1] resulted in a deprivation of his liberty interest in his reputation. Appellants Boxer and Farnell timely appeal the district court's order denying their Second Motion for Summary Judgment asserting qualified immunity.

The doctrine of qualified immunity generally shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1129 (9th Cir. 2002), *petition for cert. filed*, 70 U.S.L.W. 3758 (U.S. May 24, 2002) (No. 01-1744) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). We must determine whether "[t]aken in the light most favorable to the party asserting injury, . . . the facts alleged show the [public official's] conduct violated a constitutional right . . .", and the rights were "clearly established . . . delineated with sufficient clarity to make a reasonable [public official] in the defendant's circumstances aware that what he was doing violated the right." *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001)

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[1] This position is also referred to as Risk Manager.

(en banc) (first alteration in the original, citations omitted).[2]

At the time Appellants acted in 1998, "the law was clearly established that . . . a liberty interest was implicated when an employee was stigmatized by charges of immoral or dishonest conduct made in the context of discharge from employment." *Brady v. Gebbie*, 859 F.2d 1543, 1556 (9th Cir. 1988) (citations omitted). Reasonable public officials in a state where state law does not protect stigmatizing charges in a public employee's personnel file from public disclosure would [have] be[en] aware that their conduct violated Cox's liberty interest in his reputation.

AFFIRMED.

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[2] Because we construe the facts in the light most favorable to Cox, there is no need to resolve the factual disputes in the record regarding whether the statements were stigmatizing and the adequacy of the hearing afforded to Cox.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAUDE COX, husband; LINDA COX, wife, Plaintiffs - Appellees, v. FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; SPOKANE COUNTY, a municipal corporation, Defendants - Appellants.	No. 00-35887 D.C. No. CV-99-00075-JLQ ORDER WITHDRAWING MEMORANDUM DISPOSITION AND DENYING PFR AND PFREB

Before: HALL, TASHIMA and RAWLINSON, Circuit Judges.

The Memorandum Disposition filed on August 8, 2002, is withdrawn. An opinion will be filed.

A majority of the panel has voted to deny the petition for panel rehearing. Judges Tashima and Rawlinson voted to deny the petition for rehearing en banc, and Judge Hall recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for rehearing and petition for rehearing en banc filed on September 16, 2002 is denied.

No additional petitions for rehearing may be filed in this case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAUDE COX, husband; LINDA COX, wife, Plaintiffs - Appellees, v. FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; SPOKANE COUNTY, a municipal corporation, Defendants - Appellants.	No. 00-35887 D.C. No. CV-99-00075-JLQ ORDER

Before: HALL, TASHIMA and RAWLINSON, Circuit Judges.

Defendants-Appellants' Motion to Recall the Mandate and for Leave to File Petition for Rehearing En Banc filed on March 5, 2004 is DENIED.

(2)

No. 03-1585

Supreme Court, U.S.
FILED
JUL 26 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRANCINE M. BOXER, MARSHALL FARNELL and SPOKANE COUNTY,

Petitioners,

v.

CLAUDE COX and LINDA COX,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the presence of stigmatizing information in a public employees' personnel file is sufficient publication to implicate the liberty interest under the due process clause of the Fourteenth Amendment when state public disclosure law mandates public disclosure of the personnel file upon request?

2. Whether, in light of state law mandating public disclosure of a public employee's personnel file upon request, the law was clearly established that placement of a stigmatizing termination letter in the public employees' personnel file constitutes sufficient publication to implicate the terminated employee's liberty interest?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
A. There is No Circuit Split on the Issue Decided by the District Court and the Ninth Circuit	6
B. This Case Does Not Present An Appropriate Occasion for the Court to Consider the Relevance of Extra Circuit Authority to the Qualified Immunity "Clearly Established" Inquiry	10
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 12

Bishop v. Wood, 426 U.S. 341 (1976) 5, 7, 8

Board of Regents v. Roth, 408 U.S. 564 (1972) ... 5, 6, 12, 14

Buxton v. City of Plant City, Florida, 871 F.2d 1037 (11th Cir. 1989) ..... *passim*

Codd v. Velger, 429 U.S. 624 (1977) 7

Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3rd Cir. 1988) 9

Cox v. Roskelley, 359 F.2d 1105 (9th Cir. 2004) 5, 8, 10, 11

Dawson v. Daly, 120 Wn.2d 782, 845 P.2d 995 (1993) 3, 7, 13

Donato v. Plainview School District, 96 F.3d 623 (2nd Cir. 1996) 8, 9

Hope v. Pelzer, 536 U.S. 730 (2002) 13, 15

Llamas v. Butte Community College District, 238 F.3d 1123 (9th Cir. 2001) 11, 12

Ledford v. Delancey, 612 F.2d 883 (4th Cir. 1980) 8

Mustafa v. Clark County School District, 157 F.3d 1169 (9th Cir. 1998) 11, 12

Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71 (1st Cir. 1990) 9

Saucier v. Katz, 533 U.S. 194 (2001) 13

Wilson v. Layne, 526 U.S. 603 (1999) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. §1983 3

RCW 49.17 ..... 3, 12, 14

STATEMENT OF THE CASE

Respondent, Claude Cox, was formerly employed with Spokane County as the Safety Loss Manager, or Risk Manager. Petitioners, Francine Boxer and Marshall Farnell, are employees of Spokane County. At the time of the events at issue, Ms. Boxer was the County Administrator, and Mr. Farnell was the Director of Administrative Services. Mr. Cox reported directly to Mr. Farnell, who in turn reported to County Administrator Boxer.

This lawsuit arises out of the termination of Mr. Cox's employment with Spokane County in December 1998. Ms. Boxer and Mr. Farnell were individual decision-makers with respect to the termination of Mr. Cox from his employment.

On July 27, 1998, Spokane County incurred substantial liability for damage caused to private automobiles when the County sprayed hot tar during a road-paving project on Bigelow Gulch Road. Mr. Cox was responsible for managing the liability claims against Spokane County arising out of that mishap.

Most of the repairs on the damaged automobiles were performed by Specialty Auto and Truck Painting, Inc. ("Specialty Auto"). In August 1998, Spokane County began to receive complaints that Specialty Auto was overcharging for repairs and charging for repairs it had not made. Petitioner Boxer, and Spokane County Commissioner, John Roskelley, approached Mr. Cox and asked him to look into the problem. The County Commissioners asked the Washington State Auditor to review the Bigelow Gulch claims. On September 29, 1998, in response the State Auditor's report, Petitioners, Boxer and Farnell, placed Mr. Cox on administrative leave with pay pending further

investigation. Spokane County publicly disclosed, via press release, that Mr. Cox had been suspended pending investigation of the Bigelow Gulch incident.

On November 8, 1998, Ms. Boxer and Mr. Farnell wrote Mr. Cox a letter entitled "Notice of Potential Disciplinary Action." This letter summarized four areas of concern detailed in Spokane County's Investigative Report issued on October 30, 1998. The letter allowed Mr. Cox a period of time to respond to the areas of concern. On November 19th, Mr. Cox submitted his response through counsel.

Petitioners were dissatisfied with Mr. Cox's response, and discharged him from his employment by letter dated December 11, 1998. The termination letter articulated two overall reasons for discharging Mr. Cox: (1) failure to meet his responsibilities in conjunction with the processing of claims arising from the Bigelow Gulch incident; and (2) poor management judgment. With respect to the Bigelow Gulch claims, the termination letter alleged overcharging by Specialty Auto and payment to Specialty Auto for work that was never performed. The termination letter discussed four specific examples of the exercise of poor judgment on Mr. Cox's part: (1) calling the supervisor of the individual who alerted County officials to possible overcharging by Specialty Auto; (2) calling the County's insurer to complain about the Claims Manager's criticism of the way the Bigelow Gulch claims were handled; (3) suggesting to his staff that they take their vehicles to Specialty Auto for repair when the owner was Mr. Cox's friend; and (4) engaging in personal business with the owner of Specialty Auto. In its June 15, 2000 Order Granting in Part and Denying in Part the Defendant's Motion for Reconsideration, the District Court observed:

> There is no doubt that these charges, if true, establish extremely poor judgment on Cox's part. . . . but the charges in the letter also arguably implicate his reputation for honesty or morality, as they give the reader the distinct impression that Cox was favoring his friend and trying to keep it quiet.

Mr. Cox's pre-termination suspension had received extensive coverage in the local press. From his suspension in September 1998 to his discharge on December 11, 1998, the entire incident was front-page news in the *Spokesman Review*, Spokane's daily newspaper. On December 14, 1998, Spokane County received a request from a member of the local press for release of Mr. Cox's termination letter. Release of the termination letter was mandated by Washington's Public Disclosure Act, RCW 42.17. Indeed, on December 16, 1998, a Spokane County Deputy Prosecuting Attorney wrote to Mr. Cox's counsel and observed: "I am unaware of any provisions [in the PDA] which would preclude my release of the [termination letter] to [the local press]. It appears that the holding of *Dawson v. Daly* . . . is dispositive of this matter."[1]

Respondent Cox filed this lawsuit on March 17, 1999, alleging causes of action under 42 U.S.C. §1983 for deprivation of property interest, wrongful discharge, and deprivation of his liberty interest in his good name. The District Court granted Petitioner's Summary Judgment

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[1] The Deputy Prosecutor's reference is to *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995, 1000 (1993) (Stating that a county prosecutor's performance evaluations are public records because "they contain information relating both to the conduct of government and to the performance of governmental . . . functions").

Motion as to Mr. Cox's property interest claim, but denied summary judgment on the liberty interest claim. Defendants subsequently filed a Motion for Reconsideration asserting that the release of the termination letter did not constitute public disclosure so as to implicate Mr. Cox's liberty interest. The District Court denied this motion with respect to Petitioners Boxer and Farnell, holding that their placement of the stigmatizing termination letter in Mr. Cox's personnel file was sufficient public disclosure to implicate his liberty interest.

Petitioners then filed a second Motion for Summary Judgment asserting a qualified immunity defense on behalf of Ms. Boxer and Mr. Farnell. The District Court denied this motion, holding that in December 1998, the law was clearly established that the placement of a stigmatizing termination letter in a Washington public employee's personnel file could give rise to a liberty interest due process claim. The District Court explained:

> This Court holds that, in these circumstances, the law was clearly established that the placement of Mr. Cox's termination letter in his personnel file could give rise to a liberty interest, due process claim. In December 1998, it was beyond dispute that governments and government officials must provide sufficient due process to a terminated employee if the reasons for the termination were stigmatizing and false, and had been made public. It had also been settled in Washington State for five years, if not longer, that the PDA required Spokane County to disclose Mr. Cox's termination letter, which was of considerable, legitimate public interest. Furthermore, all of the Circuits which had addressed a statute similar to the PDA had held that the placement of a stigmatizing and false document

> in a file subject to such a statute was sufficient public disclosure for the purposes of a liberty interest, due process claim.

Appendix at App. 14.

Petitioners appealed the qualified immunity ruling to the Ninth Circuit. On February 20, 2004, the Ninth Circuit affirmed the District Court's denial of qualified immunity to Boxer and Farnell, holding "that placement of the stigmatizing information in Mr. Cox's personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient to trigger Mr. Cox's liberty interest under the Fourteenth Amendment." *Cox v. Roskelley*, 359 F.2d 1105, 1112 (9th Cir. 2004).

REASONS FOR DENYING THE PETITION

The decision of the Ninth Circuit in this case does not conflict with the decisions of this Court, or any circuit court of appeals. Consistent with *Bishop v. Wood*, 426 U.S. 341 (1976), and *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Ninth Circuit held that a terminated public employee has a constitutionally protected liberty interest in clearing his name when stigmatizing information regarding the reasons for termination is publicly disclosed. The precise issue presented in this case is whether a liberty interest can arise from the placement of a document in a personnel file when (a) that document was clearly subject to public disclosure under state law, and (b) it was extremely likely that the press or the public would make such a request. Only one other circuit has addressed this precise issue. *Buxton v. City of Plant City, Florida*,

871 F.2d 1037 (11th Cir. 1989). The Ninth Circuit's holding that the placement of the termination letter in the employee's personnel file, and into the public record, constitutes sufficient disclosure to implicate the liberty interest is in harmony with *Buxton*. There is no circuit split on the issue presented.

There is no circuit split on the precise issue presented. Therefore, the Ninth Circuit did not err in failing to discuss the circuit split on the broader question of whether placement of a stigmatizing termination letter in the employee's personnel file is sufficient public disclosure to establish a Fourteenth Amendment liberty interest claim, in the absence of a state statute making the personnel file part of the public record. This question is not presented in this case.

In light of settled state law mandating public disclosure of Mr. Cox's personnel file on request, the Ninth Circuit properly held that the law was clearly established in December 1998 that placement of the stigmatizing termination letter in Mr. Cox's file would give rise to a liberty interest due process claim. The Court properly affirmed the District Court's denial of qualified immunity to Ms. Boxer and Mr. Farnell. The Petition for Writ of Certiorari should be denied.

A. There is No Circuit Split on the Issue Decided by the District Court and the Ninth Circuit.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court established that a terminated public employee has a constitutionally based liberty interest in clearing his name when stigmatizing information regarding the reasons for termination is publicly disclosed. Failure to provide a

"name-clearing hearing" in this circumstance is a violation of the Fourteenth Amendment's due process clause. *Id.* See also, *Codd v. Velger*, 429 U.S. 624 (1977); *Bishop v. Wood*, 426 U.S. 341 (1976). Some public disclosure of the stigmatizing reasons for termination is essential to implicate the employee's liberty interest. *Bishop,* supra.

In the instant case, the lower courts have considered whether there was sufficient disclosure of the stigmatizing information in Respondent Cox's termination letter to implicate his liberty interest. It was critical to the analysis of both the District Court and the Ninth Circuit that, under Washington State Public Disclosure law, Mr. Cox's termination letter became part of the public record immediately when it was placed into his personnel file. RCW 42.17.310; *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995, 1000 (1993). In its Order Denying Defendants' Second Motion for Summary Judgment, the District Court carefully articulated the issue presented:

> . . . [W]hether a liberty interest claim can arise from the placement of a document in a personnel file when (a) that document was clearly subject to public disclosure under state law and (b) it was extremely likely that the press or the public would make such a request.

Appendix at App. 11.

The Ninth Circuit was equally precise in stating its holding:

> We now hold explicitly that placement of the stigmatizing information in Cox's personnel file, *in the face of a state statute mandating release upon request*, constituted publication sufficient to

> trigger Cox's liberty interest under the Fourteenth Amendment.

Cox v. Roskelley, 359 F.3d, at 1112 (emphasis added).

Petitioners now seek a Writ of Certiorari, contending that this Court should accept review to resolve the circuit split on whether a document is "publicly disclosed" for purposes of *Bishop v. Wood*, supra, when it is placed in an employee's personnel file. However, that is not the issue raised by the facts of this case and decided by the District Court and the Ninth Circuit. The Ninth Circuit did not address or decide the generic issue of whether placement of a stigmatizing termination letter in a public employee's personnel file, standing alone, constitutes sufficient public disclosure to satisfy *Bishop*. Rather, the Court properly held that when a state statute makes the public employee's personnel file *part of the public record*, placement of a stigmatizing termination letter into the personnel file, i.e., into the public record, constitutes sufficient public disclosure to implicate the employee's liberty interest. 359 F.2d, at 1110 (" . . . once the stigmatizing information was placed into Mr. Cox's personnel file, it became a public record under Washington law, mandating disclosure upon request.") This holding was particularly appropriate in light of the intense local media coverage of Mr. Cox's termination.

There may be an emerging circuit split on the generic issue of whether placement of a stigmatizing termination letter in a public employee's personnel file, absent state law mandating disclosure, constitutes sufficient public disclosure for purposes of a liberty interest claim. Compare, *Donato v. Plainview School District*, 96 F.3d 623 (2nd Cir. 1996), cert. denied, 519 U.S. 1150 (1997); *Ledford v.*

Delancey, 612 F.2d 883 (4th Cir. 1980); with *Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71 (1st Cir. 1990); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139 (3rd Cir. 1988). However, the instant case simply does not present that issue. The issue decided by the Ninth Circuit in the instant case concerned whether public disclosure occurs when, under the Washington Public Disclosure Act, the stigmatizing termination letter becomes part of the public record when placed in the discharged employee's personnel file.[2]

Only one other circuit has addressed this issue. See *Buxton v. City of Plant City, Florida,* 871 F.2d 1037 (11th Cir. 1989). Faced with a Florida statute that made the stigmatizing termination letter at issue part of the public record, the Eleventh Circuit reached the same conclusion as the Ninth, i.e., sufficient publication occurred to implicate the discharged employee's liberty interest. The *Buxton* Court explained at page 1045:

> Because of the stigmatizing material in Buxton's personnel file and the internal affairs report of the English incident, both a part of the public records pursuant to Fla.Stat. §§ 119.01 and 119.07, Buxton has been foreclosed from several employment opportunities. Buxton's rights "to live and work where he will"; "to pursue any livelihood or avocation"; and "to engage in the common occupations of life" have been limited by placing his personnel file and internal affairs report of the English incident into the public record.

[2] Indeed, if this Court were to grant Certiorari and decide the issue presented in this case, it would not resolve the circuit split reflected in *Donato,* supra and *Copeland,* supra, and other cases cited above.

> Buxton's personnel file and the internal affairs report of the English incident have stigmatized Buxton in the eyes of potential law enforcement employers and in the minds of citizens reviewing this public information. The personnel file and the internal affairs report became public, pursuant to Fla.Stat. § 112.433, at the conclusion of the investigation which culminated with Buxton's termination. Because the information in the file may be reviewed years after it is filed, its publication, for due process purposes, must be held to occur at the time of filing. Protection of the due process name clearing right cannot be effectively afforded any other way.

The Eleventh Circuit in *Buxton* and the Ninth Circuit in *Cox* are the only two circuit cases to address the issue presented in this case, i.e., whether placement of a stigmatizing termination letter in a public employee's personnel file constitutes sufficient disclosure to implicate the liberty interest when state law makes the personnel file (and the termination letter) part of the public record. The Eleventh and Ninth Circuits reached precisely the same conclusion on this issue. There simply is no circuit split on the issue presented. Certiorari should be denied.

B. This Case Does Not Present An Appropriate Occasion for the Court to Consider the Relevance of Extra Circuit Authority to the Qualified Immunity "Clearly Established" Inquiry.

Petitioners invite the Court to grant certiorari in this case to consider the "relevance of extra circuit authority to the qualified immunity 'clearly established' inquiry." This argument is premised on the claim that circuits other than the Ninth have reached different conclusions with respect

to the qualified immunity issue presented in this case. However, as discussed, supra, only one other circuit has addressed the publication/liberty interest issue presented to the Ninth Circuit in this case. *Buxton v. City of Plant City, Florida*, supra.

In the instant case, the Ninth Circuit followed the Eleventh Circuit's analysis in *Buxton*, and held that placement of the stigmatizing information in Mr. Cox's personnel file, "in the face of a state statute mandating release upon request," was sufficient publication to implicate Mr. Cox's liberty interest. 359 F.3d, at 1112. There is no contrary extra circuit authority. The Ninth Circuit properly applied this court's qualified immunity precedent. Certiorari should be denied.

Petitioners cite *Mustafa v. Clark County School District*, 157 F.3d 1169 (9th Cir. 1998) and *Llamas v. Butte Community College District*, 238 F.3d 1123 (9th Cir. 2001) to argue that the Ninth Circuit had previously acknowledged the circuit split on the issue of whether placement of stigmatizing information in an employee's personnel file constitutes sufficient publication to establish a due process liberty interest claim. In both *Llamas* and *Mustafa*, the Ninth Circuit noted the circuit split on this generic issue. However, in the instant case, the panel majority clearly distinguished *Llamas* and *Mustafa* and explained the fundamental difference in the issue now presented:

> A critical fact separates this case from *Mustafa* and *Llamas*: in this case, the parties agreed, and argued in their briefs and during oral argument, that once the stigmatizing information was placed into Cox's personnel file, it became a public record under Washington law, mandating disclosure upon request. This factor takes Cox's case

> beyond the holdings of *Mustafa* and *Llamas*, and into the realm of *Board of Regents v. Roth*. See 408 U.S. at 573, 92 S.Ct. 2701.

359 F.3d, at 1110.

The critical fact in this case is that, by operation of the Washington Public Disclosure Act, RCW 42.17, the stigmatizing termination letter became part of the public record when it was placed into Mr. Cox's personnel file. Petitioners Boxer and Farnell were both long term, high ranking administrative/management employees of Spokane County. The Spokane County Prosecuting Attorney's office confirmed unequivocally that the termination letter became part of the public record when placed into Mr. Cox's personnel file. There is no question that the Petitioners knew that placement of the stigmatizing termination letter into Mr. Cox's personnel file made it part of the public record.

Both the Ninth Circuit in the instant case, and the Eleventh Circuit in *Buxton*, supra, recognized that because the termination letter became part of the public record upon placement into the employee's personnel file (by operation of law), publication in fact occurred for purposes of the liberty interest claim. The Ninth Circuit properly applied the qualified immunity analysis to these facts. There was, and is, no contrary extra circuit authority to consider.

Governmental officials performing discretionary functions generally are granted a qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Wilson v. Layne*, 526 U.S. 603 (1999); *Anderson v. Creighton*, 483 U.S. 635 (1987).

The qualified immunity inquiry involves a two-step analysis. First the Court considers whether the facts alleged by the plaintiff demonstrate that the governmental official's conduct violated a constitutional right. If violation of a constitutional right is found, the Court must determine whether or not the contours of the violated right were clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194 (2001). In determining whether a constitutional right is "clearly established," for purposes of qualified immunity, the relevant, dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted. *Id.*

In the instant case, Petitioners argue that, absent controlling Supreme Court or local circuit authority, "a Circuit split on the legal issue in question precludes a determination that the law is 'clearly established' on that issue." Petition for Certiorari at p. 25. It is true that there was no controlling Ninth Circuit authority on the issue presented at the time of Mr. Cox's discharge. This Court has been careful to caution that the absence of controlling circuit authority on the question of whether particular conduct violates a constitutional right does not entitle a governmental official to qualified immunity. *Hope v. Pelzer*, 536 U.S. 730 (2002). The salient question which the Court of Appeals was called upon to decide is whether the state of the law in 1998 gave Petitioners fair warning that placement of Mr. Cox's stigmatizing termination letter into his personnel file would constitute public disclosure. *Id.* The Washington Public Disclosure Act, and the Washington Supreme Court's 1993 decision in *Dawson v. Daly*, supra, made the answer to this question crystal clear. The termination letter became part of the public record when it

was placed into Mr. Cox's personnel file. Therefore, the state of the law in 1998 gave clear warning to Petitioners that placement of stigmatizing information into Mr. Cox's personnel file would constitute sufficient publication to implicate his liberty interest.

There was no contrary extra circuit authority for the Ninth Circuit to consider. The Eleventh Circuit was the only Court to address this issue prior to the instant case. *Buxton v. City of Plante City, Florida*, supra. The Ninth Circuit reached the same conclusion as the Eleventh Circuit in *Buxton*. Because there was no conflicting extra circuit authority for the Ninth Circuit to consider in conducting the qualified immunity analysis, this case does not provide the Court an appropriate opportunity to consider the significance of extra circuit authority on the issue of whether a constitutional right was clearly established.

The Ninth Circuit properly applied this Court's precedent in conducting the qualified immunity analysis in this case. It is well established that a terminated public employee has a constitutionally based liberty interest in clearing his name when stigmatizing information regarding the reasons for termination is publicly disclosed. *Board of Regents v. Roth*, supra. When the Petitioners placed the stigmatizing termination letter in Mr. Cox's personnel file, it became part of the public record by virtue of the Washington Public Disclosure Act, RCW 42.17. Therefore, placement of the stigmatizing termination letter in Mr. Cox's personnel file clearly constituted disclosure for purposes of the liberty interest claim. The Ninth Circuit properly concluded that Petitioners' conduct violated Mr. Cox's due process rights.

The panel majority also agreed with the District Court that the law was clearly established so that a reasonable public official "knew or should have known, that there would be 'some public disclosure' of the charges contained in the termination letter of a public employee embroiled in a dispute of public interest." 359 F.3d, at 1113. This was correct as a matter of law. It was plainly evident as a matter of fact.

The Washington Public Disclosure Act made Mr. Cox's termination letter part of the public record immediately when it was placed in his personnel file. RCW 42.17.310; *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). There is no question that Petitioners knew or should have known this. A Spokane County Deputy Prosecuting Attorney confirmed this in a letter to Mr. Cox's counsel dated December 16, 1998. See *Hope v. Pelzer*, 536 U.S. 730 (2002) (Agency's Internal Memorandum confirming that conduct at issue may be unconstitutional buttressed conclusion that constitutional right was clearly established). As the District Court observed:

> From his suspension in September 1998 to his termination on December 11, 1998, the entire incident was front-page, top story news in the Spokesman Review, Spokane's daily newspaper. It was all but a foregone conclusion that when Mr. Cox was terminated on December 11, 1998, either the press or a member of the public would request a copy of the letter under the PDA.

Appendix at App. 10.

The District Court was correct. A member of the local press presented the public record request for Mr. Cox's

termination letter to Spokane County on December 14, 1998, the next business day following the December 11 termination letter.

There is no question that placement of the stigmatizing termination letter into Mr. Cox's personnel file, and therefore into the public record, constitutes "disclosure" for purposes of his liberty interest claim. There is no question that Petitioners knew this. The Ninth Circuit properly affirmed the District Court's denial of qualified immunity. The Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 26th day of July, 2004.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CLAUDE COX AND
LINDA COX,
husband and wife,

Plaintiffs,

vs.

FRANCINE M. BOXER,
in her individual capacity;
MARSHALL FARNELL,
in his individual capacity;
and SPOKANE COUNTY,
a municipal corporation,

Defendants.

NO. CS-99-0075-JLQ

MEMORANDUM ORDER AND OPINION DENYING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 19, 2000)

Before the court is Defendants' second Motion for Summary Judgment (Ct. Rec. 58). The court held a hearing on this motion on September 7, 2000. Plaintiffs were represented by Paul Burns. Defendants were represented by Thomas Kingen.

I. Background

The full facts of this case have been described in detail in this court's earlier orders regarding Defendants' first motion for summary judgment and Defendants' motion for reconsideration (Ct. Recs. 44 and 57). It is sufficient, for the purposes of the present motion, to restate only a few pertinent facts.

This case arose out of Plaintiff Claude Cox's ("Mr. Cox's") December 11, 1998, termination from his position

as Risk Manager for Spokane County. The termination letter, which was signed by Defendant Spokane County employees Francine M. Boxer and Marshall Farnell, indicated that they had decided to terminate Mr. Cox for his role in processing claims for auto-body repairs related to a road-paving project performed by Defendant Spokane County that resulted in damage to many private vehicles.

Plaintiffs' complaint set forth two theories of recovery, both of which were based on notions of procedural due process. First, Plaintiffs claimed that Mr. Cox had a property interest in his job and that therefore the method of his termination violated his due process rights. Second, Plaintiffs claimed that the method of his termination was improper because the charges made in connection with his termination implicated his liberty interest in future employment.

Defendants filed their first motion for summary judgment in December 1999. On April 19, 2000, this court issued its order on that motion, holding that Mr. Cox did not have a property interest in his job but that he had raised an issue of fact regarding whether Defendants had violated his right to due process with regard to the liberty interest. Defendants asked this court to reconsider that ruling. On June 15, 2000, this court affirmed its conclusion that Plaintiffs had stated an issue of material fact regarding whether Defendants had violated his right to due process with regard to Mr. Cox's liberty interest, but held that his claim survived against only Ms. Boxer, Mr. Farnell, and Spokane County.

Defendants have now filed a second motion for summary judgment. They claim 1) that Plaintiffs have not stated a genuine issue of material fact as to the falsity of

the statements in the December 11, 1998, termination letter, 2) that Defendants provided Mr. Cox all of the process to which he was entitled, and 3) that Defendants are immune from liability for these claims.

II. Standard of Review

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the material facts before the court. *See Swig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in favor of the nonmoving party, there are no genuine issues of material fact in dispute. *See* Fed.R.Civ.P. 56(c).

III. Genuine Issue of Falsity

Defendants' motion attempts to revisit the issue of whether Plaintiffs have stated a genuine issue of material fact as to whether any of the statements in the termination letter were false. Defendants are correct that, to survive summary judgment, Plaintiffs must put into issue the truth or falsity of the statements which he claims implicated his liberty interest. *See Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977).

This court has already considered the falsity issue twice and concluded both times that Plaintiffs have raised a genuine issue of material fact as to the truth or falsity of the allegations in the termination letter. Although Defendants claim they are not rehashing previously decided issues, the issue of falsity has been a continual concern in

both the parties' briefing and the court's consideration of Defendants' previous motions. Defendants raised the issue in their briefing of their first motion for summary judgment (Ct. Rec. 34, p. 9) and in their briefing of the motion for reconsideration (Ct. Rec. 55, pp. 2-3). This court's orders on both those motions also expressly ruled on the issue. On April 19, 2000, this court held:

> As to the truth or falsity of the statements, Cox has repeatedly denied the allegations made in the newspaper and in his termination letter, both at the time of [the] newspaper articles and in declarations before this court. *Cox has stated a genuine issue of material fact as to the truth or falsity of the allegations Defendants made in their termination letter.* (Ct. Rec. 44, p. 12) (emphasis added).

On June 15, 2000, this court reconsidered the issue and held:

> At the hearing on the motion for reconsideration, there was considerable discussion regarding whether Cox had raised a genuine issue of material fact as to whether the charges made in the termination letter are false. Cox must show that the charges were both stigmatizing *and* false in order to recover, [*Citing Codd, supra*] However, Cox's affidavit makes it clear that he denies all of the charges made in connection with his termination. . . . *This is sufficient to raise a genuine issue of material fact about the truth or falsity of the statements.* (Ct. Rec. 57, p. 11) (emphasis added).

The court has already considered and denied Defendants' argument twice, and sees no reason to reverse itself. In addition, in response to the second motion for summary

judgment, Plaintiffs have submitted an additional affidavit from Mr. Cox in which he further denies, with greater specificity, all of the charges made in the termination letter. Although Defendants disagree with this court's previous resolution of the issue, the court will follow its earlier rulings.

IV. Qualified Immunity

Defendants also argue that Ms. Boxer and Mr. Farnell are qualifiedly immune from suit for their signing of the allegedly defamatory letter terminating Mr. Cox. These Defendants argue that it was not clearly established in December 1998 that a liberty-interest, due-process claim could arise from placing an allegedly false and stigmatizing document in a public employee's personnel file. This court has already held that a claim can arise from the placement of such a document in an employee's personnel file, as set forth in this court's June 15, 2000, Order. The question Defendants now present is whether the individual Defendants are immune from suit based on the law as it stood in December 1998. At oral argument on the Defendants' current motion for summary judgment, the court stated that its initial impression was that Defendants Boxer and Farnell were entitled to qualified immunity. However, upon reviewing the issue further in light of that argument and researching Washington State law, which at the time in question made it clear that the allegedly defamatory letter would be made available to the public and the press, the court has determined that Defendants Boxer and Farnell are not entitled to qualified immunity from this suit.

Public officials are entitled to qualified immunity for performing discretionary functions of their jobs "insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Wilson v. Layne*, 526 U.S. 603, 609 (1999). In determining whether an official enjoys qualified immunity this court must ask "1) was the law governing the official's conduct clearly established? 2) under that law, could a reasonable official have believed the conduct was lawful?" *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). As to the first prong of this inquiry, "'[c]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson, supra*, 526 U.S. at 614-15, *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

It is beyond question in this case that it was clearly established in December 1998 that public entities could not make false, defamatory, and public statements in connection with an employee's termination without providing the employee due process. Plaintiffs contend that this is a sufficiently narrow statement of the applicable legal rule and that therefore they have cleared the first hurdle of the qualified immunity analysis. Defendants counter that this court's inquiry into whether the law was clearly established in December 1998 must focus on a narrower question, namely whether it was clearly established that the placement of a termination letter in a public personnel file, without more, was sufficient public disclosure that would trigger the requirements of due process.

In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the Court made it clear that qualified immunity requires

> that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

The Ninth Circuit also recently made it clear just how precise the contours of the right must be for the purposes of qualified immunity analysis. In *Devereaux v. Perez*, 218 F.3d 1045 (9th Cir. 2000), the plaintiff had been investigated and indicted for alleged child abuse, only to have the charges dropped for lack of evidence. He sued in federal court, claiming that state officials had violated his due process rights by coercing witnesses into testifying against him. The court held that he had failed to show that there was a clearly established right that had allegedly been violated, and stated that the right which plaintiffs had to show was clearly established was the "right to have child witnesses, in a child abuse investigation, interviewed in a particular manner or pursuant to a particular protocol." *Id.* at 1053.

Devereaux thus indicates that in determining whether the applicable legal rule was clearly established, a court must focus on whether it was clearly established that the precise behavior at issue could violate constitutional rights. Given that precedent, this court agrees with Defendants that Plaintiffs bear the burden of showing that it was clearly established in December 1998 that Mr. Cox's liberty-interest, due-process rights could be violated by placing his termination letter in his personnel file, without more. Defendants claim that it was *not* clearly established

in December 1998 that they could violate Mr. Cox's rights by doing so.

Defendants rely on what, at first blush, appears to be a split in the Circuits on this issue. As this court noted in its June 15, 2000, Order, the Ninth Circuit has not yet ruled on the issue. *See Mustafa v. Clark County School District*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998). The Circuits which have decided the issue are to a certain degree evenly split, 3-3, with the Second, Fourth, and Eleventh Circuits holding that the placement of a document in a public employee's personnel file is sufficient to give rise to a due-process claim, and the First, Third, and Seventh Circuits holding that it is not, at least on the facts they considered in the cases before them. *Compare Donato v. Plainview School District*, 96 F.3d 623, 631-32 (2d Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); and *Buxton v. City of Plant City, Florida*, 871 F.2d 1037, 1044-45 (11th Cir. 1989) with *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990); *Copeland v. Philadelphia Police Dep't.*, 840 F.2d 1139, 1148 (3d Cir. 1988); and *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998). The Supreme Court has not ruled on the issue, although in *Codd v. Velger, supra*, the Court apparently assumed that the placement of a document in a public employee's personnel file constitutes public disclosure for the purposes of a procedural due process claim. *See* 429 U.S. at 625-27.

None of these cases, however, deal with the question of whether, under Washington law and in the particular circumstances of this case, it was clearly established that the placement of an allegedly defamatory letter in Mr. Cox's personnel file could constitute publication for the

purposes of a liberty-interest, due-process claim. As Plaintiffs point out, it was clear in December 1998 that once the termination letter was placed in Mr. Cox's personnel file, Washington State law required Spokane County to disclose the document in response to any request from the press or the public.

All government entities within the State of Washington are subject to the requirements of the Public Disclosure Act, RCW §§ 42.17.010-42.17.962 (the "PDA"). The PDA, which was adopted by voter initiative in 1972, denominates virtually any document generated by a public agency as a "public record" and requires disclosure of all public records unless one of the PDA's narrow exceptions applies. RCW §§ 42.17.020(36), 42.17.251, 42.17.260(1). Of those exceptions, only one arguably covers Mr. Cox's termination letter, the exception for "personal information . . . to the extent that disclosure would violate [an employee or official's] right to privacy." RCW § 42.17.310(1)(b). While this exception applies to some information in personnel files, a document is subject to the exception only if disclosure would be 1) highly offensive to a reasonable person, **and** 2) of no legitimate concern to the public. *See Dawson v. Daly*, 120 Wash.2d 782, 794-95 845 P.2d 995 (1993); RCW § 42.17.255.

In 1993, in *Dawson*, the Washington State Supreme Court held that routine performance evaluations of prosecutors are both highly offensive and not of any legitimate public interest. *See* 120 Wash.2d at 795-99. However, the court rested its decision on the fact that the evaluations in that case were routine and did not "discuss specific instances of misconduct or public job performance." *Id.* at 800. *Dawson* does not reach documents such as Mr. Cox's termination letter, which contains specific allegations of

mismanagement of substantial public funds. The Washington Court of Appeals explicitly held, after *Dawson* and prior to December 1998, that "there exists a reasonable concern by the public that government conduct itself fairly and use public funds responsibly." *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wash.App. 319, 328, 890 P.2d 544 (1995) (finding a legitimate public interest in fire chief's retirement agreement). *See also Tacoma Public Library v. Woessner*, 90 Wash.App. 205, 223, 951 P.2d 357 (Feb. 1998), *as amended on remand on other grounds*, 972 P.2d 932 (1999). Mr. Cox's termination letter was indisputably subject to disclosure because it contained specific charges both that he had acted unfairly while in his public office and that he had not used public funds responsibly. The public concern in the termination letter was legitimate and the privacy exception to Washington's disclosure laws was clearly inapplicable.

It was also highly likely that a member of the press or the public would request a copy of Mr. Cox's termination letter. As this court has repeatedly noted in its orders in this case, the Cox pre-termination suspension had received extensive coverage in the local press. From his suspension in September 1998 to his termination on December 11, 1998, the entire incident was front-page, top-story news in the *Spokesman Review*, Spokane's daily newspaper. It was all but a foregone conclusion that when Mr. Cox was terminated on December 11, 1998, either the press or a member of the public would request a copy of the letter under the PDA.

Spokane County received a request for the termination letter on December 14, 1998. Spokane County's response to that request shows that Spokane County was well aware in December 1998 that the PDA required

disclosure of the termination letter in light of the 1993 case of *Dawson v. Daly, supra*. On December 16, 1998, prosecutor James Emacio wrote to Mr. Cox's counsel to inform him that he had received the disclosure request and that Mr. Emacio planned to disclose a copy. Mr. Emacio wrote, "I am unaware of any provisions [in the PDA] which would preclude my release of the [termination letter] to [the local press]. It appears to me that the holding of *Dawson v. Daly* . . . is dispositive of this matter." (Ct. Rec. 30, Ex. B.)

It was thus not subject to debate in December 1998 that 1) a stigmatizing statement in connection with an employee termination would give rise to a liberty interest and a due-process requirement if that statement was made public, 2) Washington law mandated that the termination letter be disclosed upon request, and 3) the local press coverage of the entire incident made it extremely likely that the press or the public would request a copy of the termination letter. Defendants argue that nonetheless they cannot be held liable because the Circuits are split on whether the placement of a document in a personnel file, without more, is sufficient to give rise to a liberty interest claim.

A close look at the Circuit opinions which address whether a liberty-interest claim can arise from the placement of a document in a personnel file reveals that there is no Circuit split on the precise issue before the court, that issue being whether a liberty interest can arise from the placement of a document in a personnel file when a) that document was clearly subject to public disclosure under state law and b) it was extremely likely that the press or the public would make such a request. Of the three Circuits that have dismissed liberty-interest claims

in which the only alleged public disclosure was the placement of the document in the employee's personnel file, none of them have addressed a state statute such as Washington's PDA, and none of them concerned a highly publicized case such as Mr. Cox's.

For example, while the Seventh Circuit has stated that it requires actual disclosure of a document, none of its several cases address circumstances similar to that here. *See Ratliff v. City of Milwaukee*, 795 F.2d 612 626-27 (7th Cir. 1986) (discipline had not been made a matter of public concern; public disclosure statute not addressed); *Johnson v. Martin*, 943 F.2d 15, 16-17 (7th Cir. 1991) (no publicity of discipline; no state statute similar to the PDA discussed); *Clark v. Maurer*, 824 F.2d 565, 567 (7th Cir. 1987) (fact of termination was made public but employee's name was not; no state disclosure statute at issue); *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998) (grounds for discipline not publicized; no state statute considered). The same holds true for the cases out of the First and Third Circuits, which have ruled much less frequently on the issue. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990) (there was no publicity of the discipline; no state statute was considered); *Copeland v. Philadelphia Police Dep't.*, 840 F.2d 1139, 1148 (3d Cir. 1988) (no publicity of the discipline; no state statute addressed.)

In contrast, all of the Circuit opinions which have considered the effect of a state statute which mandates public disclosure of a particular public record have held that if the record is stigmatizing and false, its mere creation is sufficient public disclosure for the purposes of a liberty-interest claim. In *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989), public officials

had placed an allegedly false stigmatizing letter in the plaintiff-employee's personnel file. Under Florida law, the letter was a public record and its disclosure was required upon request. *See id.* at 1044-45. In fact, a refusal to provide the letter to a member of the public upon request could have resulted in criminal sanctions. *See id.* at 1044. The Eleventh Circuit held that in light of this statute requiring disclosure of the letter, placing the document in the file was sufficient public disclosure for the purposes of the plaintiff's liberty-interest claim. *See id.* at 1045-46.

The Second Circuit, in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), reached a similar conclusion. In that case, the plaintiff's name had been placed on a register of child abusers. Although the government did not take the initiative in distributing the list of abusers to the public, New York law required certain employers to consult the list before hiring an individual. *See id.* at 995-96. The fact that the stigmatizing information had to be disclosed under state statute was enough to make the inclusion of the plaintiff's name in the register, without more, sufficient public disclosure for the purposes of a liberty-interest claim. *See id.* at 1000.

These are the only two Circuit cases which this court has found that address whether the presence of a state statute mandating disclosure of a particular document or record can make the creation of that document or record sufficiently public for the purposes of a liberty-interest claim. There are no appellate decisions to the contrary, and thus no Circuit split on the issue which would result in qualified immunity. Although the Ninth Circuit has yet to rule on the issue, "[a] right can be clearly established even though there [is] no binding precedent in [the] circuit." *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir.

1989), *cert. denied*, 493 U.S. 1097 (1990), *citing Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988).

This court holds that, in these circumstances, the law was clearly established that the placement of Mr. Cox's termination letter in his personnel file could give rise to a liberty-interest, due-process claim. In December 1998, it was beyond dispute that governments and government officials must provide sufficient due process to a terminated employee if the reasons for the termination were stigmatizing and false, and had been made public. It had also been settled in Washington State of 5 years, if not longer, that the PDA required Spokane County to disclose Mr. Cox's termination letter, which was of considerable, legitimate public interest. Furthermore, all of the Circuits which had addressed a statute similar to the PDA had held that the placement of a stigmatizing and false document in a file subject to such a statute was sufficient public disclosure for the purposes of a liberty-interest, due-process claim.

This does not end the court's analysis, however. As noted earlier, the court must also analyze whether, in light of the clearly established law, a reasonable officer could have believed his conduct was lawful. *See Act Up!, supra*, 988 F.2d at 871. "[I]t is the defendants' burden to show that 'a reasonable officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right.'" *Munger v. City of Glasgow Police Dep't.*, ___ F.3d ___, 2000 WL 1252086, *4 (9th Cir.), *quoting Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1997). "Where 'conflicting inferences may be drawn from the facts [concerning the 'reasonable conduct' issue], the case must go to the jury.'" *Munger, supra,* at *4, *quoting*

LaLonde v. County of Riverside, 204 F.3d 947, 959 (9th Cir. 2000).

This court holds that, in light of this clearly established law, it was not reasonable for Mrs. Boxer and Mr. Farnell to believe that they would not implicate Mr. Cox's liberty interests if they placed this letter in his termination file. The requirement that a reasonable official would have known their actions may have violated clearly established law is to allow the officials to "reasonably anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). There was ample reason in this case for a reasonable public official to be aware that the placement of the December 11, 1998, termination letter in Mr. Cox's personnel file could give rise to liability for violating Mr. Cox's rights to due process. First, as already noted, the law was clearly established. Second, the termination letter itself contained serious, stigmatizing charges which Mr. Cox had denied. Third, the local press had covered the issue extensively for several months, making it extremely likely that the press or public would request a copy of the termination letter – which had to be disclosed under the PDA. In these circumstances, a reasonable officer would have expected that the termination letter, once signed and placed in Mr. Cox's personnel file, would be disclosed to the public in very short order.

It was thus clearly established in 1998 that the actions of Defendants Boxer and Farnell could subject them to liability for a liberty-interest, due-process claim, and a reasonable officer would have been able to anticipate that liability in this case. Defendants Boxer and Farnell are thus not entitled to qualified immunity.

It should be noted that, absent the PDA's clear requirement that the termination letter be disclosed, this court would have found that Defendants Boxer and Farnell were entitled to qualified immunity because of the split in the Circuits on the issue of whether, absent such a statute, the placement of a document in a personnel file is sufficient public disclosure. However, given the broad provisions of the PDA, no reasonable Spokane County employee could have any question that under these circumstances, Cox's termination letter was public, subject to PDA disclosure, and extremely likely to be disclosed to the press or the public shortly after Cox was termination. Nor would a reasonable Spokane County officer have doubted that he could be found liable for a violation of Mr. Cox's due process rights if the contents of the termination letter were found to be false and stigmatizing and it was found that Mr. Cox did not receive all of the process he was due.

For the reasons stated above, the individual Defendants Boxer and Farnell are not entitled to qualified immunity. Nor, it should be noted, does Defendant Spokane County enjoy immunity. *See Leatherman v. Tarant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) ("it [is] quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983."); *Wallis v. Spencer*, 202 F.3d 1126, 1143 (9th Cir. 2000) ("There are . . . no personal immunities available vicariously or otherwise to municipal actors under § 1983."). Municipalities can be held liable for the actions of the officers, even if those officers are immune, if the officers acted pursuant to the municipality's policy or practice or the officers were themselves policymakers for the municipality. *See Monell*

v. Dep't of Social Services of the City of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.E.2d 611 (1978). As this court has already held, Ms. Boxer and Mr. Farnell had the authority to terminate Mr. Cox and to draft his termination letter, and therefore were policymakers for whose actions Spokane County is accountable.

V. The Timing and Type of Process

Defendants further contend that this court must grant them summary judgment because they gave Mr. Cox all of the process which he was due. Essentially, they contend that it was enough under the Constitution to allow Mr. Cox to respond to the charges against him in writing before he was terminated.

A description of the process afforded Mr. Cox is necessary to set the stage. In September 1998, Mr. Cox was placed on administrative leave, with pay, pending an investigation into his handling of claims arising out of the Bigelow Gulch road construction. Following an extensive investigation of the Bigelow Gulch claims and other incidents in Mr. Cox's employment, on November 5, 1998, Ms. Boxer and Mr. Farnell wrote to Mr. Cox to inform him that they were considering discipline for him, including possible termination. The letter set forth various charges against Mr. Cox and informed him that he could respond in writing no later than November 12, 1998. Mr. Cox's counsel, upon receiving the letter, requested and received an additional week to respond. His request for a further extension was denied. On November 19, 1998, Mr. Cox responded to the charges, through counsel. His counsel claimed that Defendants had given Mr. Cox insufficient time to respond.

On December 9, 1998, Ms. Boxer and Mr. Farnell wrote another letter to Mr. Cox in which they stated that they had found additional evidence of improper dealings in the Bigelow Gulch claims and instructed him to respond within two days, no later than December 11, 1998. Mr. Cox responded on December 9, 1998, through counsel. On December 11, 1998, Ms. Boxer and Mr. Farnell terminated Mr. Cox. Mr. Cox never received an in-person hearing with Ms. Boxer, Mr. Farnell, or the Spokane County Commissioners, either before or after he was fired.

In order to determine whether this was sufficient process, this court must apply the three-part test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Under that test, a court determines whether the type and timing of the process given were sufficient by balancing 1) the private interest that will be affected by the official action, 2) the risk that an erroneous deprivation will occur without additional procedure, and 3) the government's interest, which includes the interest in avoiding the fiscal and administrative burdens of providing additional process. *See id.* at 335. There is no fine line between sufficient and insufficient process – a court must consider these factors against the factual backdrop of the case at hand. *See Brady v. Gebbie*, 859 F.2d 1543, 1554 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989) ("when the hearing must be held and what procedural protections must be given at the hearing are determined on a case-by-case basis"); *Brewster v. Board of Ed. of the Lynwood Unified School District*, 149 F.3d 971, 983 (9th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999) ("procedural due process essentially boils down to an ad hoc balancing inquiry"). There is no particular type of process that must be provided if process is due – the required process could be an

evidentiary hearing or something considerably less intricate, such as the right to present evidence in writing. *See Brady, supra*, 859 F.2d at 1554. *See also Eldridge, supra*, 424 U.S. at 348 ("The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.") In this particular instance, where this court is considering the merits of Defendants' motion for summary judgment, the court's inquiry is limited to determining whether, as a matter of law, the process given was sufficient.

As for the first element of the *Eldridge* test – Mr. Cox's interest in further process – this court finds that Mr. Cox had a strong interest in additional process. Mr. Cox had been an employee of Spokane County for more than 15 years when the Bigelow Gulch claims arose, and he worked in a position imbued with considerable public trust, as he held the power to approve payment of damage claims. The termination letter charges him with a serious breach of that public trust. In short, the letter charges that he had an improper relationship with the owner of the body shop which had done most of the repair work on the Bigelow Gulch cars; he had failed to investigate claims, leading to overpayment and payment for work not performed; and he had failed to respond to the concerns of his superiors, the Spokane County Commissioners. Whether true or false, these charges label Mr. Cox as a man of questionable judgment and character and would make any possible future employer pause before placing Mr. Cox in a position of responsibility.

In addition, the charges were very public. The Bigelow Gulch incident and its aftermath had received considerable coverage in the local newspaper, the *Spokesman-Review*. From Mr. Cox's suspension in September 1998 to

his termination in December 1998, Mr. Cox was a repeated target of the newspaper coverage. The articles (described in some detail in this court's earlier orders) display a deep public fascination with Mr. Cox and the various state and local investigations into the matter. Included in the articles were insinuations that unattributable sums of money had appeared in Mr. Cox's bank account during the time of the Bigelow Gulch incident, hints that criminal investigations were underway, and regular reports on the disciplinary process. Although none of the stinging allegations were attributed to any of the Defendants in this case, the newspaper articles are nonetheless relevant to determining the timing and amount of the process Mr. Cox should have received. *See Matthews v. Harney County, Oregon, School Dist. No. 4*, 819 F.2d 889, 894 (9th Cir. 1987). This court holds that given the nature of Mr. Cox's position, the seriousness of the allegations, and the extensive press coverage of the incident, Mr. Cox had a very strong interest in a name-clearing hearing in which he could refute the charges.

The second *Eldridge* factor (the risk of an erroneous deprivation) also suggests that summary judgment is not proper. There is no doubt that Spokane County performed an extensive review of the Bigelow Gulch claims. Spokane County prepared an October 30, 1998, report which provided extensive detail of potential problems with Mr. Cox's handling of the claims. In addition, Spokane County reviewed reports from Washington State auditors who had investigated the matter. However, Mr. Cox received only a limited opportunity to respond and explain the apparent problems. He was given just two weeks to respond to the initial factual allegations against him, and only 2 days to respond to a supplemental allegation. He was allowed only

to respond in writing and did not receive any in-person hearing regarding the allegations of misconduct.

There are also issues of fact concerning whether Defendants adequately reviewed the responses that Mr. Cox provided. The decision to terminate Mr. Cox was apparently made by Ms. Boxer, although the ultimate authority appears to have rested with the Spokane County Commissioners. Ms. Boxer testified in a deposition that two of the three Commissioners ratified the decision to terminate Cox. (Ct. Rec. 71, Ex. B.) Yet two of the Commissioners testified in depositions that they had no recollection of whether the Commissioners ever reviewed or considered Mr. Cox's November 19, 1998, letter in response to the charges made in Ms. Boxer and Mr. Farnell's letter of November 5, 1998; one of those Commissioners indicated that he was never given a copy of the November 19, 1998, letter. (Ct. Rec. 71, Exs. A and C.) There is thus an issue of fact concerning whether the decision to terminate Mr. Cox was made without considering Mr. Cox's responses to the charges against him. The Ninth Circuit has made it clear that providing a person with the form of due process, without also providing him the substantive consideration required by due process, does not satisfy Constitutional requirements. *See Harney County, supra*, 819 F.2d at 893-94. There is thus an issue of fact concerning whether Mr. Cox received sufficient consideration of his response. That issue of fact is also extremely material to this case, since if the Commissioners entirely ignored Mr. Cox's responses, there was a very high risk of an improper deprivation of Mr. Cox's liberty interests.

This brings the court to the third *Eldridge* factor, the government's fiscal and administrative interests. Defendants claim that Spokane County had a very strong

interest in bringing Mr. Cox's employment to an end without further due process because his position granted him significant power over public funds which the County had a duty to protect. The Supreme Court has recognized that the government has a strong interest in "expeditious removal of unsatisfactory employees." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543, 105 S.Ct. 1493, 84 L.Ed.2d 494 (1985). However, the Court has also recognized that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *See id.* at 544-45. That is precisely what Spokane County did here – Mr. Cox was suspended with pay for 3 months before his termination, thus alleviating any need to terminate him without a more complete hearing. It appears that the government's interest in not providing Mr. Cox with additional process was the interest in not paying him further and in not paying the costs associated with a public hearing. These are not especially compelling interests, as they will arise in virtually every termination of a high-profile employee.

After balancing the interests, the court cannot say that, as a matter of law, Defendants gave Mr. Cox all the process that he was due under the *Eldridge* test. Mr. Cox had a particularly strong interest in protecting his reputation in an environment that had been substantially colored by extensive and unfavorable news coverage. The government's interests in denying Mr. Cox an in-person hearing are particularly weak in comparison. In addition, there is an issue of fact concerning whether the process they did provide put form over substance, thereby creating a great risk that Mr. Cox would be wrongfully deprived of his liberty interests. This balance

does not compel the conclusion that, as a matter of law, Defendants provided him with sufficient process.

The court notes that the foregoing conclusions are supported by numerous cases that the parties have cited to the court or that the court has located and reviewed on its own. In many of these cases, the dispute centered over whether or not the plaintiff had received sufficient *pre-deprivation* due process even though the plaintiff had also received a *post-deprivation* evidentiary hearing. The courts have thus assumed in cases similar to this one that an in-person hearing was required or appropriate after termination, *in addition to* pre-deprivation process similar to that provided in this case.

In *Matthews v. Harney County, supra*, for example, a public-school teacher had been fired on stigmatizing grounds amid a whirlwind of unfavorable press coverage. The teacher received minimal pre-deprivation process but within a month after her termination, she received an evidentiary hearing before the high school board. Several months later, she received a further evidentiary hearing before the elementary school board. *See* 819 F.2d at 890-91. Despite this considerable post-deprivation process, however, the Ninth Circuit held that there were issues of fact concerning whether she received sufficient process because of deficiencies in the pre-deprivation process. *See id.* at 892-94. She may not have received due process even though she received two post-deprivation evidentiary hearings before two different bodies. In light of such precedent, this court cannot say that Spokane County's procedures in this case, which involved no in-person hearing of any kind, were sufficient as a matter of law.

Similarly instructive is *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773 (9th Cir. 1982), another case involving a public school teacher alleging a deprivation of his liberty and property interests without sufficient process. In that case, the teacher had been dismissed without any pre-termination process but had been given a full evidentiary hearing one month after his termination. *Id.* at 775-76. Despite the fact that the former employee had received the opportunity to present evidence and cross-examine the witnesses against him at the post-termination hearing, the Ninth Circuit affirmed an award of damages to the employee for the lack of pre-termination process. *See id.* at 780-81. Again, a full post-termination evidentiary hearing was still not sufficient due process.

If in *Vanelli* and *Harney County*, as in several other cases, an employee's due process rights were not satisfied by a full post-termination evidentiary hearing, then this court cannot hold in this case that as a matter of law Spokane County provided Mr. Cox sufficient due process when they gave him only two weeks to respond in writing and never allowed him the opportunity to present his case in person.

The court notes that Defendants have attempted to distinguish the requirements of *Vanelli, Harney County*, and other cases on the grounds that they involved property interests, as opposed to liberty interests. However, the Ninth Circuit has rejected any notion that, as a matter of law, liberty interests are entitled to less process than property interests, by stating that a "liberty interest . . . may or may not [require] more exacting . . . procedures" than a property interest. *See Harney County, supra*, 819 F.2d at 893. The fundamental question is whether the process given was sufficient to protect the particular

interest at hand. In this case, the court cannot say that as a matter of law the process was sufficient to protect Mr. Cox's liberty interest and therefore the court must deny Defendant's Motion for Summary Judgment.

VI. Conclusion

IT IS HEREBY ORDERED that Defendants' second Motion for Summary Judgment (Ct. Rec. 58) is DENIED.

IT IS SO ORDERED, The Clerk is hereby directed to enter this Order and provide copies to counsel.

DATED this 19th day of September 2000.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

CLAUDE COX AND LINDA COX, husband and wife,

Plaintiffs,

vs.

JOHN ROSKELLEY, in his individual capacity; KATE McCASLIN, in her individual capacity; PHILLIP D. HARRIS, in his individual capacity; FRANCINE M. BOXER, in her individual capacity; MARSHALL FARNELL, in his individual capacity; and SPOKANE COUNTY, a municipal corporation,

Defendants.

NO. CS-99-0075-JLQ

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

(Filed Jun. 15, 2000)

Before the Court is Defendants' Motion for Reconsideration or Certification (Ct. Rec. 49). The court held a hearing on this motion on June 14, 2000. Plaintiffs were represented by Paul Burns, Defendants were represented by Thomas Kingen.

I. Background

On April 19, 2000, this court granted in part and denied in part Defendants' motion for summary judgment. The court held that Plaintiff Claude Cox ("Cox") did not have a property interest in his position at Spokane County

but that he had stated a genuine issue of material fact concerning whether Defendants had violated his liberty interest in future employment. On May 3, 2000, Defendants requested that this court reconsider its ruling on the liberty interest or, in the alternative, to certify an interlocutory appeal on certain issues. The court has heard argument on the motion and has fully considered the issues and now issues its opinion on the merits of that motion.

The facts of the case are outlined in the court's April 19, 2000, Order. However, it should be noted for the sake of background that Cox claims Defendants implicated his liberty interest in future employment when they terminated him in December 1998. He claims that a September 1998 press release, quotes of Defendants in various newspaper articles, and his December 11, 1998, termination letter all implicated his liberty interest. Defendants' contend that none of those documents implicated his liberty interest and that, even if they did, Cox has not shown that any of the Defendants can be held liable for the infringement on his liberty interest.

II. Liability for Creation and Distribution of the Termination Letter

Much of Defendants' current motion focuses on the contention that this court incorrectly held that Defendants could be held liable for the statements made in the December 11, 1998, letter which informed Cox that he had been terminated from his position as Spokane County's Risk Manager. Defendants lodge several challenges to the court's reliance on the termination letter.

A. Liability for Disclosure According to State Law

Cox's termination letter was distributed to a local journalist only after that journalist requested it under a Washington State statute which requires disclosure of such documents. Defendants claim that they should not be held liable for disclosing the letter in accordance with state law. In the alternative, they request that this court certify an interlocutory appeal of this question.

The request for certification is based on the fact that the Ninth Circuit has apparently not yet ruled on the question of whether disclosure of public documents in accordance with an applicable statute can give rise to a liberty interest claim. The only case cited by the parties which addresses the issue – and the only case this court located in its own research – is *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989). In *Buxton*, the plaintiff claimed that his termination letter stigmatized him, although it had only been placed in his personnel file and was not distributed to the press. *See id.* at 1042-46. The plaintiff contended that the letter had nonetheless been made public because a state statute made all public employee records accessible to the public (and future employers). The Eleventh Circuit agreed, holding that "the stigmatizing information placed into the public record by a state entity, pursuant to a state statute or otherwise, constitutes sufficient publication to implicate the liberty interest under the due process clause . . . " *Id.* at 1046.

Cox urges this court to follow the Eleventh Circuit, while Defendants urge this court to reject *Buxton* as placing an unfair burden on governments which comply

with applicable law. However, of the rule announced in *Buxton* and the rule proposed by Defendants (that disclosure pursuant to a statute cannot give rise to liability), only the *Buxton* rule offers sufficient protection for the liberty interests of public employees. A public employee's liberty interest has been implicated when his government employer "impose[s] on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

If this court were to adopt Defendants' position, a government employer could falsely and wrongfully stigmatize an employee and disable that employee from ever finding work again, so long as the employer disclosed its defamatory documents only when a member of the public requested that they do so. Defendants' rule would put form over substance. The *Buxton* rule, on the other hand, properly places the burden on the government to ensure that its charges against employees are truthful and accurate, regardless of whether the government plans to publicize those charges on its own initiative. This court will not adopt a rule that would allow municipalities to use statutory obligations to shield stigmatizing comments from judicial review. Public disclosure, whether required by statute or not, is still public disclosure. As the *Buxton* court noted, "[p]rotection of the due process name clearing right cannot be effectively afforded any other way." *See Buxton*, 871 F.3d at 1045.

The termination letter, therefore, is subject to review by this court for the purposes of considering Plaintiffs' claim of liberty interest deprivation without due process. The court does not find that there is sufficient question

about what the proper rule is to warrant certification of the issue for appeal. That request is denied.

B. The Contents of the Termination Letter

Defendants also argue that this court erred when it held that the termination letter raised an issue of act as to whether Defendants implicated Cox's liberty interest. As noted in the court's April 19, 2000, Order, the government implicates an employee's liberty interest if it impugns his "reputation for honesty or morality," *Matthews v. Harney County, Oregon, School District No. 4*, 819 F.2d 889, 891 (9th Cir. 1997), or puts his "good name, reputation, honor, or integrity . . . at stake." *Roth*, *supra*, 408 U.S. at 573. In contrast, "a charge of incompetence or inability to get along with coworkers . . . does not" give rise to a liberty interest claim. *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 365 (9th Cir. 1976).

Defendants argue, as they did in the briefing of the motion for summary judgment, that the termination letter charges Cox with incompetence and poor management but does not question his honesty, morality, honor, or good name. Once again, in determining whether an issue of fact exists, the court rejects this claim.

The letter, read as a whole, arguably charges Cox with dishonesty. *Inter alia*, the letter includes the following charges regarding his relationship with Ken Orrino, the owner of Specialty Auto, and Cox's approval of claims submitted by Specialty Auto:

- "A[n] example of inappropriate handling and/or processing of claims was that of RAC Trucking. That claimant is a long-haul driver. He has advised that he has not had

time to take his truck in for repair. However, you approved a payment of $2,187.96 to Specialty for repairs and cleaning that were never done." (Ct. Rec. 22, Ex. 5, p. 2.)

- "In addition to your failure to properly handle and process claims, you also used poor judgment in your conversation with Phil Camp at Camp Automotive, Inc. upon learning that one of his employees had called the County Commissioners Office with concerns of a possible over-charging by Specialty for services it was providing. Instead of being concerned about overcharges, you advised Mr. Camp that you did not like being called on the carpet by your superiors based upon a telephone call from one of his employees." (p. 2-3.)

- "Lastly we believe it is inappropriate for you to suggest to department staff that they take their automobiles to Specialty for auto repair when you have the discretion to direct a significant amount of County business to Specialty. Neither is it appropriate to encourage other County employees, who are interested in purchasing automobiles, to contact Mr. Orrino who you refer to as 'your friend in the business.' Likewise, your engaging in personal business transaction(s) with Mr. Orrino, when you have the discretion to direct a significant amount of County business to Specialty, is not good managerial judgment." (p. 3.)

While the termination letter dresses up these and other allegations as charges of only "poor judgment" and incompetence, they are substantially more than that. The passages quoted above arguably charge Cox with maintaining a

personal relationship with a body shop owner who billed the County for work he did not do, yet was nonetheless paid for because Cox approved the payment. And when someone expressed concern about the overall arrangement, Cox allegedly verbally abused him. There is no doubt that these charges, if true, establish extremely poor judgment on Cox's part (and of course, Plaintiffs bear the burden proving that the statements in the termination were false). But the charges in the letter also arguably implicate his reputation for honesty or morality, as they give the reader the distinct impression that Cox was favoring his friend and trying to keep it quiet.

This is not to say that the statements in the termination letter were false and stigmatizing as a matter of law. Rather, this court merely holds that an issue of fact exists as to whether the termination letter contains false statements with implicate Cox's reputation for honesty or morality.

Defendants also claim that this court erroneously concluded that the termination letter raised an issue of fact only in light of the earlier newspaper articles. Defendants are incorrect. The Order states that "genuine issues of fact exist as to whether the Defendants defamed Mr. Cox's reputation for honesty or morality, particularly when one considers that [the charges in the termination letter] were made in light of the numerous newspaper articles on the incident." It is clear from this passage that the court found the termination letter problematic when viewed in isolation. The court has not ruled that the newspaper articles are admissible at trial. In any event, the court now explicitly holds that the termination letter, on its own and without consideration of the circumstances in which it was disclosed, raises issues of fact as to

whether the letter falsely implicated Cox's reputation for honesty or morality.

C. Distribution by Placement in the Personnel File

Defendants also claim that they cannot be held liable for the statements in the termination letter because none of the Defendants named in this case actually distributed the letter to the public (the letter was distributed by County prosecutor Jim Emacio). Cox counters that it makes no difference who distributed the termination letter because it is enough that it was placed in Cox's personnel file and thus subject to possible disclosure to the public.

This issue presents the court with an interesting question. While the Ninth Circuit has noted that some courts have held that placement of a document in a personnel file is sufficient disclosure for a liberty interest claim, it has not yet decided the issue. *See Mustafa v. Clark County School District*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998). Those Circuits which have addressed the issue are evenly divided. The Second, Fourth, and Eleventh Circuits have all concluded that the placement of a document in a personnel file is sufficient to give rise to a liberty interest claim. *See Donato v. Plainview School District*, 96 F.3d 623, 631-32 (2d Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997); *Ledford v. Delancey*, 612 F.2d 883, 886-87 (4th Cir. 1980); *Buxton, supra*, 871 F.2d at 1044-45. In addition, *Codd v. Velger*, 429 U.S. 624, 625-627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) appears to support this position since the Court in that case assumed, without actually ruling, that the placement of a document in a public employee's personnel file is sufficient to give rise to

a liberty interest claim. However, the First, Third, and Seventh Circuits have all held squarely to the contrary. *See Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 74 (1st Cir. 1990); *Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139, 1148 (3d Cir. 1988); *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1040 (1998).

This court will follow the Second, Fourth, and Eleventh Circuits in holding that placement of a document in a public employee's personnel file is sufficient disclosure of that document to the public for the purposes of a due process liberty interest claim. As discussed earlier when this court held that distribution pursuant to statute can give rise to liability, government employers bear the burden of ensuring that charges in connection with employee terminations are accurate and not defamatory. If a government official places a statement about a terminated employee in a personnel file that is subject to public inspection, the official should be held liable if the statement proves to be defamatory. This rule will not, as Defendants appear to claim, impose liability on innocent parties. Rather, the rule imposes liability only where the official 1) makes defamatory statements in connection with termination of an employee and 2) places those statements where they can be viewed by the public.

Defendants claim that this holding is contrary to *Bishop v. Wood*, 426 U.S. 341 (1976), but it is not. While *Bishop* made it clear that a liberty interest plaintiff must establish that the charges were made public, that case is materially distinguishable from this case. *Bishop* involved allegedly false charges that were made orally and only to the employee in private. *See id.* at 348. (They were also made in response to interrogatories during litigation but

that was held to be not in connection with the termination. *See id.* at 348-49.) There was no evidence that the *Bishop* defendants had ever mentioned the charges to a member of the public or that they had made the charges accessible to the public. *Bishop* does not address the situation at issue here, where the charges were made available to the public but were not actually distributed by the same person who made them accessible. This court believes that the best, and proper, rule is that government employers can be held liable if they place a stigmatizing and false allegation into a publicly accessible personnel file.

The termination letter explicitly provides that a "cc" copy will be placed in Cox's personnel file. Therefore, because there is a genuine issue of fact as to whether that letter falsely implicated Cox's liberty interest, there is a genuine issue of fact as to whether the person(s) who caused that letter to be placed in Cox's file deprived Cox of his liberty interest without due process of law. As Defendants Francine Boxer and Marshall Farnell signed the letter, there is a genuine issue of fact as to whether they deprived Cox of his liberty interest without due process of law.

III. The Liability of the Individual Defendants

Defendants also contend that, even if the termination letter was defamatory, Plaintiffs have not established a genuine issue of material fact as to whether any Defendant deprived Cox of his liberty interest. The court considers this argument with regard to each individual Defendant.

A. Francine Boxer

Defendant Francine Boxer is the Spokane County Administrator. As already noted, because Ms. Boxer signed the termination letter, there is a genuine issue of material fact as to whether Ms. Boxer deprived Cox of his liberty interest without due process of law. Ms. Boxer was also quoted in several *Spokesman-Review* articles about the investigation of Cox, but this court need not consider whether those quotes also raise genuine issues of material fact.

B. Marshall Farnell

Defendant Marshall Farnell, Spokane County's Director of Administrative Services, also signed the termination letter. Therefore, there is a genuine issue of material fact as to whether Mr. Farnell deprived Cox of his liberty interest without due process of law.

C. Phillip Harris

Defendant Phillip Harris, a Spokane County Commissioner, did not sign the termination letter. Nor is there any statement in the newspapers or elsewhere attributed to Commissioner Harris. Commissioner Harris is therefore entitled to summary judgment as to Cox's liberty interest claim and Plaintiffs' claims against him shall be dismissed with prejudice.

D. Kate McCaslin

Defendant Kate McCaslin, a Spokane County Commissioner, did not sign the termination letter, but she was quoted or named as a source in three separate newspaper articles. On September 10, 1998, the *Spokesman-Review*

quoted her as saying that the state auditor's investigation would answer "How were those vendors selected? How were people referred? How did they arrive at the price they charge people? How did they determine what work actually needed to be done?" (Ct. Rec. 24, Ex. 6.) On September 30, 1998, the paper reported that she had said, "We're going to get to the bottom of this and we'll inform the public at the appropriate time. I don't think we have anything to hide, although we might have something to be embarrassed about." (Ct. Rec. 24, Ex. 9.) On November 3, 1998, a newspaper article stated that Commissioner McCaslin had indicated that a decision on Cox's future employment would be made in the near future. (Ct. Rec. 24, Ex. 12.)

Cox also claims that Commissioner McCaslin was the source of numerous other press leaks that were not attributed to any particular source, but he has submitted absolutely nothing to support that contention. As for the statements that the paper did attribute to Commissioner McCaslin, there is nothing about them that implicates Cox's reputation for honesty or morality. Rather, Commissioner McCaslin was merely commenting on the scope of the state auditor's investigation and deferring comment on the substance of the investigation. There is no genuine issue of material fact as to whether Commissioner McCaslin made any statement that implicated Cox's liberty interest. Commissioner McCaslin is therefore entitled to summary judgment as to Cox's liberty interest claim and this court will dismiss Plaintiffs' claims against her with prejudice.

E. John Roskelley

The *Spokesman-Review* twice quoted Defendant John Roskelley, also a Spokane County Commissioner. According

to the September 10, 1998, article, he said, "I don't feel comfortable spreading rumors. There were concerns over the quality of work being done, that maybe they were too overzealous in cleaning and doing the work." (Ct. Rec. 24, Ex. 6.) This statement does not defame Cox's honesty or morality. In fact, it defers comment on the allegations and appears to discuss Specialty Auto's actions, not what Cox allegedly did or did not do.

The second quote, which appeared in the September 30, 1998, article, read, "If he gets cleared of wrongdoing, he'll be reinstated." (Ct. Rec. 24, Ex. 9.) This statement requires further examination. As Cox points out, Commissioner Roskelley's statement specifically links Cox's termination to whether he had committed "wrongdoing." Cox argues that this meant that if he was reinstated, he had done nothing wrong, but if he was fired, the implication would be that the County had uncovered "wrongdoing." An allegation of "wrongdoing," while vague, arguably implicates the honesty or morality of the person targeted by the allegation, although the court does not rule on whether it is because such a ruling is unnecessary.

This Court agrees with Defendants that the "wrongdoing" statement does not implicate Cox's liberty interest. First, and most importantly, Commissioner Roskelley did not state that Cox had done anything wrong, only that his employment would turn on the outcome of the investigation. There was no actual charge of wrongdoing leveled in this statement by Commissioner Roskelley.

Second, in order to reach the conclusion urged by Plaintiffs (that Commissioner Roskelley impliedly stated that Cox's termination was the result of "wrongdoing") one would have to combine this September 30, 1998, statement

with the fact of Cox's December 11, 1998, termination. The two-and-a-half-month gap is simply too long to support a finding that Commissioner Roskelley implicated or damaged Cox's reputation for honesty or morality. The statement does not raise a genuine issue of material fact as to whether Commissioner Roskelley deprived Cox of his liberty interest without due process of law.

As there are no other statements attributed to Commissioner Roskelley, and he did not sign the termination letter, the court will enter summary judgment in his favor on the liberty interest claim and dismiss Plaintiffs' claims against him with prejudice.

IV. The Liability of Spokane County

Defendants also ask this court to revisit its holding that Spokane County may be held liable for the actions of its officers. This argument is based on Defendants' contention that Cox has not stated a genuine issue of material fact as to the individual Defendants. As already noted however, the court has not revised its earlier holding that Cox has stated a genuine issue of material fact as to whether Defendants Boxer and Farnell deprived him of his liberty interest without due process of law. Since Boxer and Farnell had the authority to terminate Cox and to write his termination letter, Spokane County may be held liable if it is found that Boxer and Farnell deprived Cox of his liberty interest without due process of law. *See Monell v. Dept. of Social and Health Services of the City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

V. The Issue of Falsity

At the hearing on the motion for reconsideration, there was considerable discussion regarding whether Cox had raised a genuine issue of material fact as to whether the charges made in the termination letter are false. Cox must show that the charges were both stigmatizing *and* false in order to recover. *See Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). However, Cox's affidavit makes it clear that he denies all of the charges made in connection with his termination. (Ct. Rec. 31.) This is sufficient to raise a genuine issue of material fact about the truth or falsity of the statements.

VI. Conclusion

Defendants' Motion for Reconsideration (Ct. Rec. 49.) is **GRANTED IN PART** and **DENIED IN PART**. Defendants Harris, McCaslin, and Roskelley are entitled to summary judgment, and the claims against them are **DISMISSED WITH PREJUDICE**. Summary judgment is denied as to Defendants Boxer, Farnell, and Spokane County. Defendants' Motion for Certification (Ct. Rec. 49) is **DENIED**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and provide copies to counsel.

DATED this 15th day of June, 2000.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES
DISTRICT JUDGE

(3)

Supreme Court, U.S.
FILED
AUG 20 2004
OFFICE OF THE CLERK

No. 03-1585

In the

Supreme Court of the United States

FRANCINE M. BOXER, MARSHALL FARNELL and SPOKANE COUNTY,
Petitioners,

v.

CLAUDE COX and LINDA COX,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

INTRODUCTION 1

REASONS FOR GRANTING THE PETITION 2

The Court Should Resolve the Deep and Persistent Split and Determine Whether a Mere Likelihood or Possibility of Future Dissemination Satisfies *Bishop*'s "Public Disclosure" Requirement, or Whether Actual Dissemination Is Needed. 2

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Bishop v. Wood, 426 U.S. 341 (1976) ..... passim

Board of Regents v. Roth, 408 U.S. 564 (1972) 2

Bonamy v. City of Seattle, 92 Wash. App. 403, 960 P.2d 447 (1998) 10

Buxton v. City of Plant City, Fla., 871 F.2d 1037 (11th Cir. 1989) 5, 7, 8, 9

Codd v. Velger, 429 U.S. 624 (1977) 1, 2

Cooley v. Pa. Hous. Fin. Agency, 830 F.2d 469 (3d Cir. 1987) 4, 10

Cox v. Roskelley, 359 F.3d 1105 (9th Cir. 2004) ..... passim

Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623 (2d Cir. 1996) 5

Johnson v. Martin, 943 F.2d 15 (7th Cir. 1991) 3, 7, 10

Ledford v. Delancey, 612 F.2d 883 (4th Cir. 1980) 4

Llamas v. Butte Cmty. Coll. Dist., 238 F.3d 1123 (9th Cir. 2001) ..... passim

Mustafa v. Clark County Sch. Dist., 157 F.3d 1169 (9th Cir. 1998) ..... passim

Olivieri v. Rodriguez, 122 F.3d 406 (7th Cir. 1997) ..... passim

Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71 (1st Cir. 1990) 3, 10

Swinton v. Safir, 697 N.Y.S.2d 869, 720 N.E.2d 89 (N.Y. 1999) 2, 4, 5, 8

Statutes

3 V.I. CODE ANN. § 881 (2002) 9

32 P.R. LAWS ANN. § 1781 (2002) 9

5 ILL. COMP. STAT. § 140/2 (2002) 8

ALA. CODE § 36-12-40 (2002) 8

ALASKA STAT. § 40.25.110 (Michie 2002) 8

ARIZ. REV. STAT. § 39-121.01 (2002) 8

ARK. CODE ANN. § 25-19-105 (Michie 2002) 8

CAL GOV'T CODE § 6252 (West 2002) 8

CAL. GOV. CODE § 6200 9

CAL. GOV. CODE § 6252(e) 9

CAL. GOV. CODE § 6253 9

CAL. GOV. CODE § 6254 9

COLO. REV. STAT. § 24- 72-303 (2002) 8

CONN. GEN. STAT. § 1-200 (2002) 8

D.C. CODE ANN. § 2-502 (2002) 8

DEL. CODE ANN. tit. 29, § 10002 (2002) 8

FLA. STAT. § 119.01 (West 2003) 8

GA. CODE ANN. § 50-18-70 (2002) 8

HAW. REV. STAT. § 92F-3 (2002) 8

IDAHO CODE § 9-337 (Michie 2002) 8
IND. CODE § 5-14-3-2 (2002) 8
IOWA CODE § 22.1 (2002) 8
KAN. STAT. ANN. § 45-217 (2002) 8
KY. REV. STAT. ANN. § 61.870 (Michie 2002) 8
LA. REV. STAT. ANN. § 44:1 (West 2002) 8
MASS. GEN. LAWS ch. 66, § 1 (2002) 8
MD. CODE ANN., STATE GOV'T § 10-611 (2002) 8
ME. REV. STAT. ANN. tit 1, § 402 (West 2002) 8
MICH. COMP. LAWS § 15.232 (2002) 8
MINN. STAT. § 13.01 (2002) 8
MISS. CODE ANN. § 25-61-3 (2002) 8
MO. REV. STAT. § 109.210 (2002) 8
MONT. CODE ANN. § 2-6-101 (2002) 8
N.C. GEN. STAT. § 132-1 (2002) 9
N.D. CENT. CODE § 44-04-18 (2002) 9
N.H. REV. STAT. ANN. § 91-A:1 (2002) 9
N.J. STAT. ANN. § 47:1A-1 (West 2002) 9
N.M. STAT. ANN. § 14-3-2 (Michie 2002) 9
N.Y. PUB. OFF. LAW § 87 (McKinney 2002) 9
NEB. REV. STAT. § 84-712 (2002) 8
NEV. REV. STAT. § 239.010 (2002) 8

OHIO REV. CODE ANN. § 149.43 (West 2002) 9
OKLA. STAT. tit. 51, § 24A.3 (2002) 9
OR. REV. STAT. § 192.001 (2002) 9
PA. STAT. ANN. tit. 65, § 66.1 (West 2002) 9
R.I. GEN. LAWS § 38-2-2 (2002) 9
S.C. CODE ANN. § 30- 4-20 (Law. Co-op. 2002) 9
S.D. CODIFIED LAWS § 1-27-21 (Michie 2002) 9
TENN. CODE ANN. § 10-7-503 (2002) 9
TEX. GOV'T. CODE. ANN. 552.022 (Vernon 2002) 9
UTAH CODE ANN. § 63-2-201 (2002) 9
VA. CODE ANN. § 2.2-3701 (Michie 2002) 9
VT. STAT. ANN. tit. 1, § 317 (2002) 9
W. VA. CODE § 29B-1-1 (2002) 9
WASH. REV. CODE § 42.17.020(36) 9
WASH. REV. CODE § 42.17.250 (2002) 9
WASH. REV. CODE § 42.17.255 & .310 9
WASH. REV. CODE § 42.17.270 9
WASH. REV. CODE § 42.17.290 9
WIS. STAT. § 19.35(1) (2002) 9
WYO. STAT. ANN. § 16-4-201 (Michie 2002) 9

INTRODUCTION

Cox opposes the Petition for Certiorari for a single reason—he claims that there is not a circuit split on the first question presented to the Court. (Br. in Opp'n at 6.) Cox's position is untenable.

In *Bishop v. Wood*, the Court held that a terminated employee's liberty is not implicated unless the reasons for the discharge are publicly disclosed. 426 U.S. 341, 348 (1976). Here, the Ninth Circuit explicitly held that a document in an employee's personnel file is "publicly disclosed" if the document is one that is *subject* to disclosure under state law. *Cox v. Roskelley*, 359 F.3d 1105, 1112 (9th Cir. 2004).

In so holding, the Ninth Circuit squarely aligned itself with those circuit courts of appeals that hold *Bishop*'s "public disclosure" requirement satisfied by the mere existence of stigmatizing information in an employee's personnel file, so long as there is a *likelihood* or *possibility* that the information may be disseminated. The Ninth Circuit's holding is thus at loggerheads with those circuit courts of appeals that reject the likelihood of future dissemination standard, holding instead that *Bishop*'s public disclosure requirement is satisfied only when the information in the personnel file is *actually* disseminated to others.

As it did in *Codd v. Velger*, 429 U.S. 624 (1977), the Court should grant certiorari to resolve the issue.[1]

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[1] In *Codd*, the Court did not reach the issue of whether making a personnel file containing stigmatizing information available to prospective employers satisfies *Bishop's* public disclosure requirement, one of two issues for which it had granted certiorari. The Court concluded that the plaintiff's liberty-interest claim was fatally

REASONS FOR GRANTING THE PETITION

The Court Should Resolve the Deep and Persistent Split and Determine Whether a Mere Likelihood or Possibility of Future Dissemination Satisfies *Bishop*'s "Public Disclosure" Requirement, or Whether Actual Dissemination Is Needed.

The rule of law underlying the first question presented is, on its face, straightforward. A terminated employee's liberty is not implicated "when there is no public disclosure of the reasons for the discharge." *Bishop*, 426 U.S. at 348; *see also Codd*, 429 U.S. at 628 (recognizing that due process is required "[o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination") (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Bishop*, *supra*)).

As is evident, however, from the numerous conflicting court of appeals opinions interpreting *Bishop*, determining what constitutes "public disclosure" has proven elusive. In the nearly thirty years since *Bishop* was decided, the circuit courts of appeals have "reached diametrically different conclusions." *Cox*, 359 F.3d at 1115 n.2 (Hall, J., dissenting); *see also Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997) (Posner, J.) (recognizing and describing split); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1179 n.10 (9th Cir. 1998) (recognizing split); *Llamas v. Butte Cmty. Coll. Dist.*, 238 F.3d 1123, 1129-30 (9th Cir. 2001) (same); *Swinton v. Safir*, 697 N.Y.S.2d 869, 872-73, 720 N.E.2d 89, 92-93 (N.Y. 1999) (recognizing and describing federal circuit split).

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flawed because falsity had been neither alleged nor proven. *Id.* at 626-27.

At one end of the continuum are those courts that require *actual* dissemination of the allegedly false and stigmatizing information. *See Olivieri*, 122 F.3d at 408 (collecting cases). In such jurisdictions, the public disclosure requirement of a liberty-interest claim is not satisfied merely because an employee's personnel file contains allegedly defamatory information, even if it is very likely that the information will ultimately be disseminated to others.

For example, in *Johnson v. Martin*, a probationary police officer was terminated after a random drug test proved positive. 943 F.2d 15, 16 (7th Cir. 1991). The terminated officer's personnel file contained the positive drug-test result, and the employee brought suit. *Id.* The Seventh Circuit flatly rejected the employee's claim that his liberty interest was implicated by the mere presence of the test result in his personnel file, notwithstanding that it was highly likely that the result would ultimately be disseminated to others. *Id.* at 17. The court held that until such time as the information in the personnel file was in fact disseminated to the public, the employee's liberty interest was not implicated. *Id.* at 16-17.

Similarly, in *Ortega-Rosario v. Alvarado-Ortiz*, a document implicating an employee in a theft was placed in the employee's personnel file. 917 F.2d 71, 72 (1st Cir. 1990). Thereafter, the employee was terminated, and he filed suit alleging, among other things, that he had been deprived of liberty without due process. *Id.* The First Circuit upheld the district court's dismissal of plaintiff's liberty-interest claim, holding that the mere presence of the stigmatizing document in the employee's file did not constitute dissemination for purposes of a liberty-interest claim because the document had not been otherwise disclosed. *Id.* at 74-75.

Likewise, in a case remarkably similar to the present one, an allegedly stigmatizing termination letter was copied to an employee's personnel file pursuant to a "carbon copy" annotation on the letter. In resolving the employee's liberty-interest claim, the Third Circuit affirmed summary judgment for the employer, because the employee had shown, at most, that a copy of the letter was placed in his file and "ha[d] not offered any evidence of actual dissemination." *Cooley v. Pa. Hous. Fin. Agency*, 830 F.2d 469, 474 (3d Cir. 1987).

At the other end of the continuum, and in marked contrast to the aforementioned cases, are those jurisdictions holding that actual dissemination is *not* required to satisfy *Bishop*'s public disclosure requirement and that the mere presence of stigmatizing information in a public employee's personnel file is sufficient if there is a possibility or likelihood that the information in the file will be disseminated to others.[2] *See Olivieri*, 122 F.3d at 408 (collecting cases).

For example, the Fourth Circuit does not require actual dissemination. It instead holds the public disclosure requirement satisfied if the allegedly stigmatizing contents of an employee's personnel file "may be the subject of inspection by prospective employers." *Ledford v. Delancey*, 612 F.2d 883, 886 (4th Cir. 1980). The Eleventh Circuit likewise does not require actual dissemination, but instead holds that placing a document in a public employee's

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[2] A handful of other courts "have hedged" on the issue. *See Olivieri*, 122 F.3d at 408 (Posner, J.) (describing cases). For example, after discussing the split in the federal circuits, the New York Court of Appeals held that proof of actual dissemination of the information in the personnel file is required if the plaintiff seeks compensatory-type damages, but that proof of only a likelihood of dissemination is required if a plaintiff seeks only expungement of the document. *Swinton*, 697 N.Y.S.2d at 872-73, 720 N.E.2d at 92-93.

personnel file is "sufficient publication" for a liberty interest claim, if the file is available for review upon request pursuant to state law. *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1046 (11th Cir. 1989). Similarly, the Second Circuit does not require actual dissemination, holding instead that the public disclosure element "is satisfied where the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 631-32 (2d Cir. 1996) (internal quotation marks and citation omitted).

Numerous courts, both federal and state, have expressly recognized this split in authority among the federal circuit courts. *See, e.g., Olivieri*, 122 F.3d at 408; *Swinton*, 697 N.Y.S.2d at 872-73, 720 N.E.2d at 92-93. Prior to ruling in the instant case, the Ninth Circuit had expressly recognized, but avoided, this circuit split on two occasions.

In the first case, *Mustafa v. Clark County School District*, the plaintiff appealed, *inter alia,* the district court's ruling that charges of sexual misconduct included in a teacher's personnel file, which was available for prospective employers to review, had not been "publicized" for purposes of a liberty-interest claim. 157 F.3d 1169, 1179 (9th Cir. 1998). Although the Ninth Circuit commented in dicta that this ruling "may be problematical," the court never reached the issue because it held the employee's liberty-interest claim deficient for other reasons. *Id.* Nonetheless, *Mustafa* expressly recognized that the circuits were split on the issue of whether actual dissemination by the employer is required to satisfy the publication element of a liberty-interest claim, and it recognized that the Ninth Circuit had not yet decided the issue. *Id.* at 1179 n.10.

In *Llamas v. Butte Community College District,* the Ninth Circuit again faced the question of whether placing derogatory information in an employee's personnel file constitutes the public disclosure required by *Bishop*. 238 F.3d 1123, 1129-30 (9th Cir. 2001). The court again acknowledged the split in the circuits and that it had not yet decided the issue. *Id.* at 1130 (citing *Olivieri,* 122 F.3d at 408, and cases cited therein). As in *Mustafa*, however, the court avoided resolving the issue, holding instead that the liberty-interest claim failed because the employee's file had been purged. Thus, the court explained:

> We do not need to address the current circuit split as to whether an employer can satisfy the publication prong [of a liberty-interest claim] by maintaining stigmatizing information in its personnel files.

Id. Notwithstanding, *Llamas* held the individual defendants entitled to qualified immunity because "[i]t is not well established, and the unlawfulness would not be apparent to a reasonable community college official, that filing derogatory material . . . constituted a violation of [plaintiff's] constitutional rights." *Id.* at 1131.

The issue of whether an employer "publicly discloses" a document by placing it in an employee's personnel file was once again squarely before the Ninth Circuit in the instant case. The court initially avoided the issue by summarily affirming the district court's decision in a six-sentence unpublished opinion that did not even acknowledge, much less address, the circuit split. (App. 84-86.)

Only on motion for reconsideration of its unpublished opinion did the Ninth Circuit finally decide the issue that it had repeatedly avoided: whether actual dissemination by an employer to others is required to satisfy *Bishop*'s public disclosure requirement, or whether a likelihood or

possibility of future dissemination instead suffices. The panel majority joined the ranks of those courts that do *not* require actual dissemination:

> We now hold explicitly that placement of the stigmatizing information in Cox's personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient [for purposes of a liberty-interest claim].

Cox, 359 F.3d at 1112. In other words, the majority held that because Cox's termination letter was subject to disclosure upon request, the letter was "publicly disclosed" for purposes of due process when it was placed in his personnel file—regardless of whether a request was ever made. Thus, the court necessarily rejected an *actual* dissemination standard.

The panel majority characterized its decision as a logical extension of its prior reasoning in *Mustafa* and *Llamas,* and an adoption of the analysis used by the Eleventh Circuit in *Buxton*. Inexplicably, however, the majority did not even acknowledge the circuit split recognized in *Mustafa* and *Llamas*, even though it discussed both cases in great detail. The panel also failed to address the decisions of its sister circuits that were contrary to its holding, as well as Judge Hall's forceful dissent. *Id.* at 1115 n.2 (Hall, J., dissenting).

Notwithstanding the panel majority's silence, there can be no serious dispute that its holding—that a document subject to disclosure under state law is "publicly disclosed" when it is placed in an employee's personnel file—directly conflicts with those circuits that require that the stigmatizing information in the personnel file be *actually disseminated* to others. *See, e.g., Johnson,* 943 F.2d at 17 (explicitly rejecting the Second Circuit's standard that a

likelihood of dissemination suffices; "Defining 'public disclosure' in a way which encompasses 'no public disclosure' is an exercise we choose not to embrace."). Conversely, the panel's holding is entirely consistent with those circuits that hold that *Bishop*'s public disclosure requirement is satisfied if there is a likelihood or possibility that the stigmatizing information in an employee's personnel file may be disclosed to others. For these reasons, Cox's contention that the Ninth Circuit's holding does not implicate the circuit split discussed herein—and in *Mustafa, Llamas*, *Olivieri,* and *Swinton*, among others—is, at best, disingenuous. *See Cox*, 359 F.3d at 1113 (Hall, J., dissenting) (explaining that the panel majority "cho[se] sides on an issue upon which other circuits have manifestly disagreed, and [the Ninth Circuit has] explicitly refrained from addressing").

Likewise, Cox's contention that Washington's public records act distinguishes this case from all cases save *Buxton* is misguided. Every state in the nation has a public records act that provides for the disclosure, upon request, of non-exempt public records.[3] In holding *Bishop's* public

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[3] *See* ALA. CODE § 36-12-40 (2002); ALASKA STAT. § 40.25.110 (Michie 2002); ARIZ. REV. STAT. § 39-121.01 (2002); ARK. CODE ANN. § 25-19-105 (Michie 2002); CAL GOV'T CODE § 6252 (West 2002); COLO. REV. STAT. § 24- 72-303 (2002); CONN. GEN. STAT. § 1-200 (2002); DEL. CODE ANN. tit. 29, § 10002 (2002); D.C. CODE ANN. § 2-502 (2002); FLA. STAT. § 119.01 (West 2003); GA. CODE ANN. § 50-18-70 (2002); HAW. REV. STAT. § 92F-3 (2002); IDAHO CODE § 9-337 (Michie 2002); 5 ILL. COMP. STAT. § 140/2 (2002); IND. CODE § 5-14-3-2 (2002); IOWA CODE § 22.1 (2002); KAN. STAT. ANN. § 45-217 (2002); KY. REV. STAT. ANN. § 61.870 (Michie 2002); LA. REV. STAT. ANN. § 44:1 (West 2002); ME. REV. STAT. ANN. tit 1, § 402 (West 2002); MD. CODE ANN., STATE GOV'T § 10-611 (2002); MASS. GEN. LAWS ch. 66, § 1 (2002); MICH. COMP. LAWS § 15.232 (2002); MINN. STAT. § 13.01 (2002); MISS. CODE ANN. § 25-61-3 (2002); MO. REV. STAT. § 109.210 (2002); MONT. CODE ANN. § 2-6-101 (2002); NEB. REV. STAT. § 84-712 (2002); NEV. REV. STAT. § 239.010 (2002); N.H. REV. STAT. ANN. § 91-

disclosure requirement satisfied, the Ninth and Eleventh Circuits relied on the fact that these acts "mandat[e] release upon request," *Cox*, 359 F.3d at 1112, making it possible that a document "may be reviewed years after it is filed," *Buxton*, 871 F.2d at 1045. The Ninth and Eleventh Circuits are thus no different than those jurisdictions, such as the Second and Fourth Circuits, that hold the public disclosure requirement satisfied if there is a *possibility* or *likelihood* that a document in a personnel file will be disseminated—that the document falls within the purview of a state's public records act simply establishes the requisite possibility or likelihood.[4] This approach stands in clear contravention of the approach followed by the First, Third, and Seventh Circuits, where *actual* dissemination is

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A:1 (2002); N.J. STAT. ANN. § 47:1A-1 (West 2002); N.M. STAT. ANN. § 14-3-2 (Michie 2002); N.Y. PUB. OFF. LAW § 87 (McKinney 2002); N.C. GEN. STAT. § 132-1 (2002); N.D. CENT. CODE § 44-04-18 (2002); OHIO REV. CODE ANN. § 149.43 (West 2002); OKLA. STAT. tit. 51, § 24A.3 (2002); OR. REV. STAT. § 192.001 (2002); PA. STAT. ANN. tit. 65, § 66.1 (West 2002); 32 P.R. LAWS ANN. § 1781 (2002); R.I. GEN. LAWS § 38-2-2 (2002); S.C. CODE ANN. § 30- 4-20 (Law. Co-op. 2002); S.D. CODIFIED LAWS § 1-27-21 (Michie 2002); TENN. CODE ANN. § 10-7-503 (2002); TEX. GOV'T. CODE. ANN. 552.022 (Vernon 2002); UTAH CODE ANN. § 63-2-201 (2002); VT. STAT. ANN. tit. 1, § 317 (2002); VA. CODE ANN. § 2.2-3701 (Michie 2002); 3 V.I. CODE ANN. § 881 (2002); WASH. REV. CODE § 42.17.250 (2002); W. VA. CODE § 29B-1-1 (2002); WIS. STAT. § 19.35(1) (2002); WYO. STAT. ANN. § 16-4-201 (Michie 2002).

[4] Indeed, the documents at issue in *Llamas* clearly were public records under California's public disclosure act, which is substantively nearly identical to Washington's. *See generally and compare* WASH. REV. CODE § 42.17.270 *with* CAL. GOV. CODE § 6253 (requiring release of public records upon request); *compare* WASH. REV. CODE § 42.17.020(36) *with* CAL. GOV. CODE § 6252(e) (defining public records similarly); *compare* WASH. REV. CODE § 42.17.290 *with* CAL. GOV. CODE § 6200 (prohibiting public records from being destroyed to prevent disclosure); *compare* WASH. REV. CODE § 42.17.255 & .310 *with* CAL. GOV. CODE § 6254 (establishing similar limited privacy exemptions).

required.[5] *See, e.g., Johnson*, 943 F.2d at 17; *Ortega-Rosario*, 917 F.2d at 74-75; *Cooley*; 830 F.2d at 474-75; *see also Cox*, 359 F.3d at 1115 n.2. (Hall, J., dissenting) (recognizing that panel majority's opinion contravenes those of other circuits).

The Court should grant certiorari to resolve this split and to determine whether proof of actual dissemination is needed to satisfy *Bishop*'s public disclosure requirement.

CONCLUSION

For the reasons herein and in the Petition for Writ of Certiorari, Petitioners respectfully request that certiorari be granted.

RESPECTFULLY SUBMITTED this 20th day of August, 2004.

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[5] Significantly, case law concerning Washington's public records act does not support Cox's position. It supports the position of the First, Third, and Seventh Circuits—that there is no "public disclosure" unless and until a document is actually disseminated. *See Bonamy v. City of Seattle*, 92 Wash. App. 403, 409, 960 P.2d 447, 450-51 (1998) ("[P]ublic disclosure is not necessary until and unless there has been a specific request for records.... A public agency cannot be expected to disclose records that have not yet been requested.").